(1)
FILED
'97 1200 JAN 2 0 1998
OFFICE OF THE CLERK

Nº. _____

In The
Supreme Court of The United States
October Term 1997

JAMES C. WHERRY
Petitioner,

v.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT,
Respondent.

Petition For A Writ Of Certiorari To the Supreme Court of the State of Iowa

PETITION FOR WRIT OF CERTIORARI

JAMES C. WHERRY*
Attorney at Law
326 West Third Street, Suite 911
Davenport, IA 52801-1220
(319) 323-7707

**pro se* Counsel of Record

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

96 pp

QUESTIONS PRESENTED

I. Does the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution permit the Iowa Supreme Court to severely restrict the Petitioner's right to advertise even when the restriction lacks a rational basis?

II. Does the First Amendment of the Constitution of the United States permit the Iowa Supreme Court to prohibit the Petitioner from truthfully advertising specific areas of the law in which he practices?

III. Does the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution permit the Iowa Supreme Court to grant some attorneys - but not the Petitioner - the constitutionally-protected right to commercial free speech?

IV. Do the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution permit the Iowa Supreme Court to consider a prior decision against the Petitioner in determining appropriate

sanctions in the present case when the previous decision was without hearing or right of appeal?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

I. THE COURT BELOW DECIDED SIX IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND THE RESOLUTION OF THESE ISSUES BELOW CONFLICTS WITH THE GOVERNING PRINCIPLES OF PRIOR DECISIONS OF THIS COURT 11

A. This Court Should Decide Whether Iowa's Rules Which Impair Attorney Advertising Violate The Fourteenth Amendment Because The Rules Lack A Rational Basis 11

B. This Court Should Decide Whether Truthful And Readily Verifiable Statements About The Most Basic Element Of Attorney Advertising - Fields Of Practice - Can Be Severely And Unreasonably Restricted, Or Whether Such Restrictions Violate The First Amendment 16

C. This Court Should Decide Whether Iowa's Regulatory Scheme, Which Permits Some Attorneys (But Not The Petitioner) To Advertise, Violates The Equal Protection Clause Of The Fourteenth Amendment 26

D. This Court Should Decide Whether The Iowa Supreme Court's Decision Violated The Petitioner's Right To Due Process 28

CONCLUSION 30

APPENDICES

Supreme Court of Iowa, Opinion, filed October 22, 1997 ..... A - 1

Greivance Commissoin of the Supreme Court of Iowa, Findings of Fact, Conclusions of Law and Recommendation ..... B - 13

U. S. District Court, Southern District of Iowa, Memorandum Opinion ..... C - 20

Iowa Rules of Court, Disciplinary Rules ... D - 31

TABLE OF AUTHORITIES CITED

Cases — Page

United States Supreme Court Cases

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 810 (1977) ..... *passim*

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(1980) 18, 20, 21

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) 23

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) 11, 14

Deakins v. Monaghan, 484 U.S. 193, 1088 S.Ct. 523, 98 L.Ed.2d 529 (1988) 29

Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) 26

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792,
123 L.Ed.2d 543 (1993) 19, 20

Florida Bar v. Went For It, Inc., 515 U.S. 618,
115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ..... *passim*

44 Liquormart, Inc., _ U.S. _, 116 S.Ct. 1495,
134 L.Ed.2d 711 (1996) 11

Ibanez v. Fla. Dept. of Bus. & Pro. Regulation,
512 U.S. 136, 114 S.Ct. 2084,
129 L.Ed.2d 118 (1994) 19

In re R.M.J., 455 U.S. 191, 102 S.Ct. 929,
71 L.Ed.2d 64 (1982) 14, 18, 21, 24

Kramer v. Union Free School District, 395 U.S. 621,
89 S.Ct. 1886, 23 L.Ed.2d 600 (1969) 26

Louisville Gas & Elec. Co. v. Coleman,
277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928) 15

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817,
18 L.Ed. 583 (1967) 26

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n,
457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) . . 29

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447,
98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) 17

Peel v. Attorney Reg. & Disciplinary Com'n,
496 U.S. 91, 110 S.Ct. 2281,
110 L.Ed.2d 83 (1990) . . . . . *passim*

Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620,
134 L.Ed.2d 855 (1996) 10, 15, 16

Rubin v. Coors Brewing Co., 514 U.S. 476,
115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) 10, 28

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct.
1916, 100 L.Ed.2d 475 (1988) 17

Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836,
92 L.Ed. 1161 (1948) 15

Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848,
94 L.Ed. 1114 (1950) 15

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48, L.Ed. 346 (1976) 27, 28

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1991) 7, 29

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 13, 17, 19, 23

Constitutional Provisions

U.S. Const., First Amendment . . . . . *passim*
U.S. Const., Fifth Amendment 2
U.S. Const., Fourteenth Amendment 2, 11, 26, 28

Federal Statutes and Regulations

28 U.S.C. Sec. 1257(3) 1

Icwa Rules of Professional Ethics and Conduct

DR 2-101(A) 5, 27
DR 2-101(B) 4
DR 2-101(C)(5) 13
DR 2-101(C)(10) 12

DR 2-101(C)(13) 5
DR 2-101(D)(4) 12
DR 2-105(A)(4) ..... *passim*

Other Authorities

ABA, Lawyer Advertising at the Crossroads (1995) 8

Formal Opinions of the Iowa Supreme Court Board of Professional Ethics and Conduct, July 1, 1965-July 1, 1997, Opinion 95-21, February 22, 1996, ADVERTISING: BAR, ELECTRONIC 23

LOWER COURT REPORTS AND OPINIONS

On May 5, 1995, the United States District Court for the Southern District of Iowa issued a Memorandum Opinion in a related case. This document is unreported and is reprinted at Appendix C - 20.

On April 18, 1997, the panel of the Grievance Commission of the Supreme Court of Iowa issued its Findings of Fact, Conclusions of Law and Recommendations. This document is unreported and is reprinted at Appendix B - 13.

On October 22, 1997, the Supreme Court of Iowa issued its opinion adopting the report of the Grievance Commission and publicly reprimanding the Petitioner. This document is reported at 569 N.W.2d 822 (Iowa 1997) and is reprinted at Appendix A - 1.

JURISDICTION

This is a petition to review the Opinion of the Iowa State Supreme Court that was entered on October 22, 1997. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment of the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Disciplinary Rule 2-101 of the Iowa Code of Professional Responsibility for Lawyers. This rule is lengthy and is set forth at Appendix D - 31.

Disciplinary Rule 2-105(A)(2) of the Iowa Code of Professional Responsibility for Lawyers. This rule is lengthy and is set forth at Appendix D - 48. The rule lists potential "areas of practice" which an attorney may advertise.

Disciplinary Rule 2-105(A)(4) provides of the Iowa Code of Professional Responsibility for Lawyers provides:

> "DR 2-105 DESCRIPTION AND LIMITATION OF PRACTICE
>
> (4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2), a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:
>
> (a) The lawyer must have devoted the greater of 200 hours or twenty percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and
>
> (b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study in each separate

indicated field of practice during the preceding calendar year."

STATEMENT OF THE CASE

In 1988, the Iowa State Supreme Court amended the Iowa Code of Professional Responsibility for Lawyers. The Code regulates the conduct of attorneys in the State of Iowa.[1] At that time, the current version of Disciplinary Rule 2-105(A)(4) was adopted. DR 2-105(A)(4) prohibits an attorney from advertising the areas of law in which he or she practices (divorce, bankruptcy, etc.), unless that attorney has had a substantial amount of practice in that area for a number of years and has completed set levels of continuing legal education ("CLE"). At a minimum, an attorney must have the greater of two hundred hours or twenty percent of his or her practice in that field in the preceding two years and ten hours of continuing legal education in the preceding calendar year.

The rule is a complete ban. It covers all forms of advertising. An attorney who fails to qualify under DR 2-105(A)(4) may not advertise his or her areas of practice in the yellow pages, in the newspaper, in magazines, on billboards, on radio, on television, or through direct mail solicitation. DR 2-101(B). The rule provides no other way to demonstrate competence in an area of law. Iowa also requires all attorneys

---

[1] The Iowa Code of Professional Responsibility for Lawyers consists of nine general "Canons" of law explained and elaborated on by a set of "Disciplinary Rules" (hereinafter "DR") and Ethical Considerations.

who advertise to include several lengthy disclaimers in their advertising disavowing any claim of expertise in the fields of law in which they advertise.[2]

The Petitioner graduated from the University of Iowa College of Law in 1991 and was admitted to practice law in the State of Iowa in June of that year after taking the Iowa bar exam. Hearing Transcript ("H.Tr.") at 39. By graduating from an accredited law school and successfully completing the Iowa bar exam, the Petitioner fulfilled the requirements laid down by the Iowa State Supreme Court itself for practicing law in Iowa. Iowa Sup.Ct.R. 100 to 106. Upon admission to the bar, the Petitioner served for a year as a law clerk to the Honorable William L. Edmonds, United States Bankruptcy Judge for the Northern District of Iowa in Sioux City. H.Tr. at 39-40.

In September, 1992, the Petitioner opened his solo practice in Davenport, Iowa. H.Tr. at 39-40. Shortly after he opened his private practice, the Petitioner began to advertise in local phone books. Several copies of the ads were lodged with the Clerk of the U. S. States Supreme Court at the time of the filing of. The Petitioner began by advertising his availability to practice in bankruptcy. H.Tr. at 40. At that time, in 1992, the Petitioner was ineligible to advertise in any area of the law because he had not been out of law school for more than two years and, thus, did not have the requisite

---

[2]See DR 2-101(A), Apdx D - 31; DR 2-101(C)(13), Apdx D - 39; and DR 2-105 (A)(3)(c), Apdx D - 50.

levels of practice. DR 2-105(A)(4). He could not advertise his availability to practice in bankruptcy, even though he had clerked in bankruptcy court for a year. Later, the Petitioner expanded his advertising to include reference to his practice in divorce, wills and social security appeals. H.Tr. at 40. By January, 1997, about ten to fifteen percent of the Petitioner's practice was in criminal work, ten percent was in family law, and the rest was in bankruptcy or general, miscellaneous matters. H.Tr. at 41.

At no time did the Petitioner hold himself out to be a "specialist" in any area of law. On the contrary, the Petitioner's advertisements specifically denied any specialty by stating that he was "available to practice in, but not limited to" specific areas of law. The Petitioner's advertisements also stated that he was engaged in "general practice." H.Tr. at 40. (Copies of these advertisements have been lodged with the office of the Clerk of the U. S. Supreme Court at the time of the filing of this Petition for the Court's review and convenience.)

In 1993 the Petitioner was admonished by the Iowa Supreme Court Board of Professional Ethics and Conduct[3] (hereinafter the "Board") and was advised that his advertising violated DR 2-105(A)(4). H.Tr. 6 and 67. The Petitioner vehemently asserted that the disciplinary rule was

---

[3] At this time, the Board was officially known as the Committee on Professional Ethics and Conduct of the Iowa State Bar Association.

unconstitutional. H.Tr. at 67-68. No hearing was ever held on the subject. The matter was dealt with entirely in writing. Id. The admonition was non-appealable, and his arguments were ignored. Id.

In January, 1995, the Petitioner filed a complaint in the United States District Court for the Southern District of Iowa and asked that DR 2-105(A)(4) be declared unconstitutional. In a decision dated May 5, 1995, the Honorable Judge Harold D. Vietor dismissed the relevant portion of the Petitioner's complaint and held that, since the Board had once again initiated an inquiry into the Petitioner's advertising, the Court could not rule on these issues under Younger abstention principles.[4] A copy of this Memorandum Opinion is attached at Apdx C - 20. Judge Vietor wrote that the Petitioner's constitutional concerns would be considered at every level, by the Board, by the Grievance Commission Panel and, if it came to it, by the Iowa State Supreme Court, itself. Memorandum Opinion at 5 and 6, Apdx D - 26-28. This turned out, later, to be untrue. The federal complaint was dismissed, soon thereafter.

In 1996, the Board filed its complaint against the Petitioner before the Grievance Commission of the Supreme Court of Iowa, and a hearing was held on January 22, 1997. At the hearing, the Board presented no testimony supporting its claim that DR 2-105(A)(4) was constitutional. The Board

---

[4] Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1991).

offered no testimony about what substantial governmental interests were served by DR 2-105(A)(4), how the rule met these interests, what alternatives were available, why they were rejected, and whether or not the rule was narrowly drawn.

The Petitioner appeared and offered testimony about his own educational background and legal experience. The Petitioner also offered evidence that DR 2-105(A)(4) was unconstitutional, citing an American Bar Association report on advertising which called Iowa's rules "abolitionist" and "restrictive." Petitioner's Exhibit D in the case below.[5] The Association's report raised concerns that limited access to legal services had raised the costs of services which were already criticized by the public as expensive. Id. at 127-132.

The Board never suggested that the Petitioner had made a false or misleading statement.[6] No client claimed to have been misled by the Petitioner's advertising. The Petitioner had practiced in each area in which he had

---

[5] ABA, Lawyer Advertising at the Crossroads (1995).

[6] At the Grievance Commission hearing, the attorney for the Board argued that the Petitioner`s advertising should be analyzed like "ads which are only potentially misleading . . ." H.Tr. at 12. In its brief before the Iowa State Supreme Court, the Board acknowledged that "Ads stating that a lawyer practices in a particular area of the law are not false (assuming that the lawyer does in fact practice in that area). Such ads, however, are at least potentially misleading." The Board's Brief to the Iowa State Supreme Court at 13.

advertised his availability to practice.

On April 18, 1997, the panel for the Grievance Commission issued its recommendation. The panel held the Petitioner had violated DR 2-105(A)(4). The panel further held that it was without authority to consider the constitutional issues submitted by the Petitioner and recommended that the Petitioner be reprimanded. Apdx B - 13.

The Petitioner filed a timely notice of appeal to the Supreme Court of Iowa, and the matter was taken up by that Court. On October 22, 1997, the Supreme Court of Iowa adopted the panel's report and publicly reprimanded the Petitioner. 569 N.W.2d 822, 824 (Iowa 1997), Apdx A - 1.

In its opinion, the Court began by suggesting that commercial speech enjoys only "limited protection." Id. at 824, Appendix to this Petition at _. The Iowa Supreme Court concluded that the Petitioner's advertising was actually misleading because of his relative inexperience in one or more of the fields of law in which he advertised. Id., at 826, Appendix to this Petition at __. This conclusion was contrary to the Board's own position before the Grievance Commission and in its brief to the Iowa Supreme Court.

The Iowa high court concluded that DR 2-105(A)(4) met the three-prong test used to analyze rules under the commercial free speech doctrine and held that its rule was constitutional. Id. at 825, Apdx A - 6. The Court also rejected the Petitioner's equal protection claims and stated, "The rule

treats all lawyers the same, and all lawyers are subject to it." Id. at 827, Apdx A - 11.

This case is constitutionally significant. First, the United States Supreme Court recently struck down a state consitutional amendment that banned ordinances protecting homosexuals and held that the amendment could not pass the rational basis test. Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). This case is the first since Romer to consider whether equal protection analysis should be applied to protect other, less-threatened members of the community.

Second, the Iowa Supreme Court misread this Court's recent decision in Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 133 L.Ed.2d 541 (1995). As will be explained, below, that case involved a limited ban on one certain form of advertising. This case involves a complete ban on advertising at all times, in all manners, and in all places. Courts may see Went For It as a complete reversal of the attorney advertising cases that began with Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 810 (1977). This Court should use this case to revisit these issues and correct whatever misperceptions state courts may have.

Some have expressed a concern that there is disjuncture between regular commercial free speech cases and the attorney advertising cases. Went For It, 515 U.S. at 635 (J. Kennedy, dissenting). There have been several recent "regular" commercial free speech cases. Rubin v. Coors

Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); 44 Liquormart, Inc., _ U.S. _, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). This case could be used to reconcile any concerns over the two lines of cases. These goals could be accomplished without a change in the law. The Court need only uphold its own prior decisions.

I. THE COURT BELOW DECIDED FOUR IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND THE RESOLUTION OF THESE ISSUES BELOW CONFLICTS WITH THE GOVERNING PRINCIPLES OF PRIOR DECISIONS OF THIS COURT.

A. This Court Should Decide Whether Iowa's Rules Which Impair Attorney Advertising Violate The Fourteenth Amendment Because The Rules Lack A Rational Basis.

The Equal Protection clause requires that regulations enforced at law have a rational basis. In City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) the United States Supreme Court struck down a city zoning ordinance requiring a special use permit for a home for the mentally handicapped. The

Court concluded that the ordinance did not have a rational basis because of numerous inconsistencies in the law. In that case, the Cleburne city council argued that locating the home in close proximity to a school was dangerous because students at the school would harass the residents of the home. Id., 473 U.S. at 449. This argument was despite the fact that at least thirty of the residents were students at the school. Id. The home had to be located on "a five hundred year flood plain." Id. In striking down the ordinance, this Court looked at the statute and its enforcement, as a whole.

Iowa's Disciplinary Rules governing advertising are replete with inconsistencies. DR 2-105(A)(4) prevented the Petitioner from making the statement that he is available to practice in any specific area of law. Other disciplinary rules permit the Petitioner to advertise his affiliation in legal fraternities and organizations dedicated to particular areas of the law. DR 2-101(C)(10) and (C)(13). The Petitioner can advertise his affiliation with the American Bankruptcy Institute (H.Tr. at 20), or his membership in the Family Law small section of the Iowa State Bar Association, but he cannot advertise the fact that he is available to practice in these areas under DR 2-105(A)(4).

The Petitioner may advertise a "fixed rate" or "flat fee" for services in particular areas of the law and even name the areas of law. DR 2-101(D)(4) & (E). The Petitioner can advertise "simple wills, $50 flat rate", even though he is not qualified under DR 2-105(A)(4) to tell anyone that he is

available to practice in wills. Under DR 2-101(D)(1), the Petitioner has the right to state that he gives a "free consultation for bankruptcy and family law matters," even if he cannot advertise his practice in these areas under DR 2-105(A)(4).

The Petitioner may advertise that he is admitted to practice in certain specialized courts such as the bankruptcy court. DR 2-101(C)(4). The Petitioner can advertise his legal writings in bankruptcy. H.Tr. at 42. DR 2-101(C)(5). All told, the Petitioner could use the words "bankruptcy," "wills" or "family law" numerous times in his advertising, even though he is forbidden to come right out and mention the fact that he is able to practice in these areas.

The Petitioner operates a free telephone information line which provides basic information about bankruptcy to the public. H.Tr. at 20. The ethics Board never complained about this portion of the Petitioner's advertising even though it figures prominently in his yellow page ads[7] (Copies of these advertisements have been lodged with the office of the Clerk

---

[7] It would be even more unsettling if the Board did object to pre-recorded informational messages. If it did, this Court would be faced with an even greater wrong because the ethics Board would be cutting off access by the public to important legal information. "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647, 105 S.Ct. 2265, 2279, 85 L.Ed.2d 652 (1985).

of the U. S. Supreme Court at the time of the filing of this Petition for the Court's review and convenience.) Common sense is the touchstone of all laws regulating advertising. Certainly, the public would at least guess that the Petitioner is available to practice in bankruptcy, considering that he operates this sort of information line. The Iowa Supreme Court considered none of this in its ruling.

An attorney can advertise that he is admitted to practice before the United States Supreme Court, even though this may suggest that he practices in the field of appellate work. In re R.M.J., 455 U.S. 191, 205-206, 102 S.Ct. 929, 938-939, 71 L.Ed.2d 64 (1982). The Iowa Supreme Court's decision conflicts with the holding in In re R.M.J. and with this Court's rational basis analysis in Cleburne.

While DR 2-105(A)(4) need not be perfect, it must at least be rational. The rule itself requires an advertising attorney to work the greater of two hundred hours or twenty percent of his or her time in practice in an advertised field of law. The rule does not require that the practice be good practice. Two hundred hours of malpractice in a field of law for two years is sufficient to permit an incompetent attorney to advertise under DR 2-105(A)(4), while one hundred hours of highly competent work is not.

Second, the rule is not consistently or fairly applied. DR 2-105(A)(4) requires more work in an area of law from an attorney who works more total hours than from an attorney who works less. An attorney who practices two thousand

hours per year, overall, but who only works for three hundred ninety-nine hours in a particular area of law (and attends one hundred hours of CLE in that area every year and teaches three law school courses on the subject) cannot advertise in the area of law while an attorney who only practices for a total of two hundred hours per year in one field of law (and attends the necessary ten CLE hours) can advertise in that area. These examples show the transparent problems surrounding DR 2-105(A)(4).

Unusual distinctions or discriminations under the law require the Court to carefully consider whether a law is "obnoxious to the constitutional provision." Romer v. Evans, 517 U.S. 620, ___, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996), quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928). "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" Romer, 116 S.Ct. at 1628, quoting Sweatt v. Painter, 339 U.S. 629, 635, 70 S.Ct. 848, 850-851, 94 L.Ed. 1114 (1950) which quoted Shelley v. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948).

In Romer, this Court struck down a provision of the Colorado constitution which prohibited laws protecting homosexuals from discrimination. The Court did so on grounds that the constitutional provision lacked a rational basis. Romer, 116 S.Ct. at 1628. While attorneys have never suffered the extensive discrimination faced by homosexuals

in the United States, recent attempts to curb attorney advertising seem to come in response to a sense that attorneys are predatory, and that their advertising is either offensive to the general public, or regarded with deep suspicion.[8] The Iowa State Supreme Court's decision in the present case is contrary to the careful reasoning in Romer.

B. This Court Should Decide Whether Truthful And Readily Verifiable Statements About The Most Basic Element Of Attorney Advertising - Fields Of Practice - Can Be Severely And Unreasonably Restricted, Or Whether Such Restrictions Violate The First Amendment.

Iowa's Disciplinary Rule 2-105(A)(4) harms the practice of law and it injures the public because it

---

[8] In many of the attorney-advertising cases which have come before it, this Court, has been faced with the argument that lawyers 'cannot be trusted' or that their advertising is offensive to a mistrusting public. This Court has responded, "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." Bates v. State Bar of Arizona, 433 U.S. 350, 379, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977). See also Peel v. Attorney Reg. & Disciplinary Com'n, 496 U.S. 91, 109, 110 S.Ct. 2281, 2292, 110 L.Ed.2d 83 (1990).

unreasonably interferes with a lawyer's effort to answer the most fundamental question a client can pose: "Can you help me?" The Iowa State Supreme Court's decision upholding the rule creates a complete ban on advertising the fields of law in which an attorney practices. The ban on any given attorney may be permanent and may last a lifetime. At a minimum, an attorney will spend years earning the privilege to advertise the areas of law in which the Iowa State Supreme Court licensed the attorney to practice, when it first admitted the attorney to the bar.

States may regulate advertising that is false, deceptive, or "inherently" misleading. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472-473, 108 S.Ct. 1916, 1921, 100 L.Ed.2d 475 (1988); Zauderer, 471 U.S. at 644-645; In re R.M.J, 455 U.S. at 202. Advertising which is only "potentially" misleading cannot be eliminated by broad "prophylactic" rules. Peel, 496 U.S. at 107-109. "Potentially" harmful advertising may be limited only where there is a showing that the potential for harm is "significant." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455, 98 S.Ct. 1912, 1917, 56 L.Ed.2d 444 (1978) (upholding a ban of in-person attorney solicitation because the potential for harm was "significant"); Florida Bar v. Went For It, Inc., 515 U.S. 618, 626, 115 S.Ct. 2371, 2377, 133 L.Ed.2d 541 (1995) (upholding a thirty-day ban on attorney solicitation of personal injury victims or the relatives of wrongful death victims in light of "statistical and anecdotal" evidence that past misconduct had injured the

public and intruded on their privacy).

If the advertisement is not actually false or deceptive, then a rule regulating commercial free speech is subject to a stringent three-part test: 1.) The rule must serve a "substantial governmental interest;" 2.) The rule must directly and materially advance that interest; and 3.) The rule must be reasonable and it must be narrowly drawn. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 565, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980).

Attorneys have a First Amendment right to advertise the areas of law in which they practice. In In re R.M.J., this Court reversed a judgment reprimanding an attorney for deviating from a precise list of areas of practice in his advertising. This Court stated, ". . .States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. at 203.

The Iowa State Supreme Court refused to apply In re R.M.J., arguing that DR 2-105(A)(4) was not a complete ban on advertising because it permitted lawyers to advertise their practice after meeting the rule's burdensome requirements. 569 N.W.2d at 825-826, Appendix at _. Notwithstanding the Iowa Court's opinion, the Petitioner has proved that DR 2-105(A)(4) is a complete ban to all attorneys who are denied the right to advertise under the rule. An attorney must wait years to advertise his or her areas of legal practice and may

never qualify to advertise under DR 2-105(A)(4), if only a few clients retain the attorney in a particular area of law. The ban applies to all advertising media, print, television, or radio.

In our case, the Iowa State Supreme Court concluded that the Petitioner's advertising was actually misleading. 569 N.W.2d at 826 (Iowa 1997). Apdx A - 10-11. The evidence did not support this conclusion. The burden of justifying limitations on commercial free speech is substantial and it rests squarely on the State. Edenfield v. Fane, 507 U.S. 761, 770-771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993). "The State's burden is not slight; the 'free flow of commercial information s valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful,'" Ibanez v. Fla. Dept. of Bus. & Pro. Regulation, 512 U.S. 136, 143, 114 S.Ct. 2084, 2089, 129 L.Ed.2d 118 (1994), quoting Zauderer, 471 U.S. at 646, "The burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Edenfield, 507 U.S. at 770-771.

The Iowa Supreme Court's decision should be reversed because it does not rest on the strong foundation of proof required by Edenfield. The ethics Board failed to provide the evidence necessary to sustain DR 2-105(A)(4)'s onerous burden on advertising. There was no evidence that

the Petitioner's advertising was deceptive. No client appeared at the Petitioner's hearing and complained of being deceived. No client even suggested that he had been poorly served by the Petitioner.

In Peel v. Attorney Reg. & Disciplinary Com'n, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), this Court reversed a decision of the Supreme Court of Illinois which had held that advertising a certificate in an area of law was misleading because the public would be confused about the nature of the certificate and believe it represented a State sanctioned certificate of expertise. The United States Supreme Court rejected this argument and concluded that, "Given the complete absence of any evidence of deception in the present case, we must reject the contention that the petitioner's letterhead is actually misleading." Id., 496 U.S. at 106. In our case, the Iowa State Supreme Court erred because it did not hold its Ethics Board to the high standard of proof required by Edenfield and Peel and because the Court failed to properly examine the evidence before it to determine whether the Petitioner's advertising was deceptive.

The Iowa State Supreme Court also failed to correctly apply the three-prong test of Central Hudson Gas & Elec. Corp.. First, no evidence was presented that DR 2-105(A)(4) serves a "substantial governmental interest." The only interest which the Iowa Supreme Court relied upon was its "responsibility to protect the public interest in informed selection of legal representation." 569 N.W.2d at 825, Apdx

A - 6-7. General concerns over potential problems do not serve as justification for outright bans on advertising. In re R.M.J., 455 U.S. at 204-207. The interest served must be substantial and not merely a plea to the general good. Central Hudson , 447 U.S. at 565. To suggest otherwise would make a mockery of this prong of the test.

Second, DR 2-105(A)(4) does not directly and materially advance the Iowa Supreme Court's interest in helping the public to make "informed" decisions about legal counsel. The Board never did explain how depriving the public of information kept them "informed" about the law or legal representation. No evidence was ever presented which showed that the rule had advanced the legal profession, helped one layperson, educated and improved one attorney, or shielded a single client from unscrupulous conduct.

Third, DR 2-105(A)(4) is neither reasonable, nor is it narrowly tailored. In Went For It, Florida attorneys were prohibited from contacting the victims of personal injury accidents (or their relatives in the case of wrongful death) for thirty days from the date of the accident. Writing for the majority, Justice O'Conner cited three important limitations on Florida's rule which made it reasonable and showed that it was narrowly drawn. First, the Florida rule only lasted for a limited period of time (thirty days). Id., 515 U.S. at 632-634. Second, the rule was limited in scope and covered only direct mail solicitation. Id. There was no prohibition on other forms of advertising such as radio or television. Third, there were

no other alternative ways to protect the victims of personal injury, or those who had lost a relative due to wrongful death. Id., 515 U.S. at 631.

The duration of Iowa's DR 2-105(A)(4) is not "limited" in any rational sense of the word. A lawyer must practice in a particular area of law for at least two years (730 days) to be able to advertise in that area. That is twenty-four times the length of the ban in Went For It.

The scope of DR 2-105(A)(4) is not limited. The rule gives an Iowa attorney no other means to advertise the areas of law in which he practices. By contrast, in Went For It, the Court observed that attorneys had numerous opportunities to advertise their specific practice to the public, even during the thirty-day ban on direct-solicitation mail.

> Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. . . . Id., 515 U.S. at 633-634. (Emphasis added).

In Iowa, an attorney may do none of the these things to advertise his or her areas of practice, without first qualifying under DR 2-105(A)(4). This ban is so complete

that Iowa has even taken steps to enforce its advertising rules on the Internet.[9]

A State which seeks to justify a "blanket ban" on particular forms of advertising must make a strong showing that less restrictive alternatives will not work. Zauderer, 471 U.S. at 648-649. "[W]e have observed that the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial free speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'" Went For It, 515 U.S. at 632, quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, n. 13, 113 S.Ct. 1505, 1510, n. 13, 123 L.Ed.2d 99 (1993).

There are less restrictive alternatives available to the State of Iowa. Any time period which required less than two years of practice or twenty percent of time in an area in that year would be less restrictive. Iowa's time limits and practice requirements appear to have been randomly chosen. The standards for admission to the bar could be increased in Iowa. The Iowa State Supreme Court could administer a test to determine competency in a particular area of law before allowing an attorney to practice in that area. A test could be

---

[9] The Board has issued an opinion that any advertising on the World Wide Web "must comply strictly with DR 2-105. This includes disclosures and compliance with DR 2-105(A)(4)." Formal Opinions of the Iowa Supreme Court Board of Professional Ethics and Conduct, July 1, 1965-July 1, 1997, Opinion 95-21 February 22, 1996 ADVERTISING: BAR, ELECTRONIC.

offered for attorneys wishing to qualify for a designation as a "specialist" in a field of law. The State of Iowa could offer a designation as an "Iowa Supreme Court certified specialist" in a field of law as an incentive for taking and passing the test. This would genuinely educate the public about the quality of legal services.

Iowa could use disclaimers. The United States Supreme Court has indicated that the use of explanatory disclaimers is preferable to an outright ban on advertising. Bates, 433 U.S. at 375. See also In re R.M.J. 455 U.S. at 203; and Peel, 496 U.S. at 116-117 (concurring opinion of J. Marshall suggesting that an explanatory disclaimer may be required where the potential for misunderstanding is great). Iowa attorneys are already required to use several lengthy disclaimers in their advertising which disavow any claim of expertise.[10] There is no evidence that these disclaimers are insufficient to protect the public interest.

The issue raised in this case is important to public policy. The fundamental underlying principle governing this area of the law is that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." In re R.M.J, 455 U.S. at 203. "[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information." Peel., 496 U.S. at 108.

---

[10] See footnote 2.

Millions of citizens who live in Iowa are injured by a rule which limits their access to information. "The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced." Bates, 433 U.S. at 377. Under DR 2-105(A)(4), a layperson is forced to go through the phone book, calling countless names at random to even find out who practices a particular area of law. Iowa's rule is a paternalistic attempt to "protect" the public from basic information. Citizens in surrounding states are also hurt by the rule because attorneys who engage in a bi-state practice must conform their advertising to Iowa's limited rules.

The Petitioner is not the only individual affected by the Iowa State Supreme Court's rules. Over ten thousand attorneys are licensed to practice in Iowa. Less than ten percent of those have qualified and registered to advertise. The Board's Exhibit 6 in the case, below. The Iowa law tramples the rights of small businessmen and women.

The law hurts new attorneys, fresh out of law school, especially. "In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys." Bates, 433 U.S. at 378. DR 2-105(A)(4) serves as an "entry-barrier" for new attorneys.

C. This Court Should Decide Whether Iowa's Regulatory Scheme, Which Permits Some Attorneys (But Not The Petitioner) To Advertise, Violates The Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution requires that all citizens be treated equally under the law. There are two lines of analysis under the Equal Protection clause. If a law discriminates against a "suspect" class of individuals such as members of an ethnic minority, it runs afoul of the Equal Protection clause and strict scrutiny must apply. This is not our case. If a "fundamental right" is affected by a regulation, strict scrutiny will also apply. The Supreme Court has struck down laws prohibiting interracial marriage,[11] laws affecting voting,[12] and laws affecting travel and voting.[13]

The right to commercial free speech is a constitutionally-protected right and is, therefore, a

---

[11] Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 583 (1967).

[12] Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 600 (1969).

[13] Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

fundamental right which must be given equally to all citizens who can truthfully advertise. The right to commercial free speech does not simply derive from constitutional principles, it is part of the First Amendment. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48, L.Ed. 346 (1976). DR 2-105(A)(4) denies the Petitioner his fundamental right to commercial free speech while other, more experienced attorneys are permitted to advertise their areas of practice.

The Iowa State Supreme Court rejected the Petitioner's equal protection argument for two reasons.[14] First, the Court stated that the Petitioner was treated equally by the law because all lawyers are subject to the rule. 569 N.W.2d at 827 (Iowa 1997). While all lawyers in Iowa are subject to the law, only some lawyers are penalized by it. Seasoned attorneys with years of experience in a particular field of law are not deprived of their right to advertise by DR 2-105(A)(4). It is physically impossible for some people to meet the criteria of DR 2-105(A)(4). When the Petitioner first entered private practice in 1992, he had not been out of law school long enough to meet the rule's minimum requirement of two years of practice. Other attorneys could. "Those in similar situations" are not being treated alike.

---

[14] DR 2-105(A)(4) also violates the equal protection clause because it denies potential litigants unrestrained access to the court system by limiting their access to information about legal services and the Court should consider this argument, as well.

Second, the Iowa Supreme Court questioned whether equal protection analysis was even applicable to commercial free speech. 569 N.W.2d at 827, Apdx A - 11. Virginia Pharmacy Board established that commercial speech is constitutionally-protected. Whether to apply equal protection analysis to commercial free speech may be a question of first impression, but only because the law itself is so unique. But see Rubin v. Coors Brewing Co., 514 U.S. 476, 491, 115 S.Ct. 1585, 1594, 131 L.Ed.2d 532 (1995) (J. Stevens concurring in the judgment, suggesting that strict scrutiny be applied to "commercial" free speech cases). DR 2-105(A)(4) could never survive strict scrutiny for reasons explained in parts "A" and "B" of this Petition.

D. This Court Should Decide Whether The Iowa Supreme Court's Decision Violated The Petitioner's Right To Due Process.

The Fifth And Fourteenth Amendments of the United States Constitution guarantee the right to due process to all citizens. In a quasi-criminal situation like an ethics case, this is especially important.

The Petitioner was prevented from seeking relief in Federal Court. Judge Vietor was assured by the State that the Petitioner's constitutional claims would be addressed at every level, before the Board, the Grievance Commission, and the Iowa Supreme Court. Under these assurances, he dismissed

the relevant portions of the Petitioner's federal suit. Memorandum Order at 4, Apdx C - 25, citing Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1991); Deakins v. Monaghan, 484 U.S. 193, 206, 1088 S.Ct. 523, 98 L.Ed.2d 529 (1988); and Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)).

The Board never did consider the Petitioner's constitutional challenges. It never conducted a hearing on these challenges prior to filing its complaint before the Grievance Commission. The Petitioner was given no opportunity to appear before it to explain his case. The panel of the Grievance Commission specifically refused to consider the Petitioner's constitutional claims and held that its members "do not have the authority to make a determination as to the constitutionality of a disciplinary rule of the Iowa Supreme Court." Findings of Fact, etc. at 6, Apdx B - 18.

The Grievance Commission's panel also held that the Petitioner's prior admonition could be taken into account when it assessed the penalty for his alleged misconduct. Findings of Fact, etc., at 6-7, Apdx B - 18. The Petitioner had been previously admonished by the Board for violating DR 2-105(A)(4). H.Tr. at 6. A private admonition is non-appealable.

The Iowa State Supreme Court never indicated whether they considered the previous admonition in adopting the panel's recommendation, but it did state that if any further

violations occurred, it would take into consideration the Petitioner's admonition. 569 N.W.2d-at 827, Apdx A - 12. The Petitioner's right to due process was also violated when he was punished because of a previous decision that had been entered without a hearing or right of appeal.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

James C. Wherry,
326 W. Third St., Ste. 911
Davenport, IA 52801-1220
(319)-323-7706
Appearing pro se

APPENDIX A

SUPREME COURT
OF THE
STATE OF IOWA

OPINION
FILED, OCTOBER 22, 1997

IN THE SUPREME COURT OF IOWA

No. 243 / 97-777
Filed October 22, 1997

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS & CONDUCT,

Appellee,

vs.

JAMES C. WHERRY,

Appellant.

On review of the report of the Grievance Commission.

Appeal from recommendation of grievance commission in attorney discipline case. ATTORNEY REPRIMANDED.

James C. Wherry, Davenport, pro se.

Norman Bastemeyer and Charles L. Harrington, Des Moines, for appellee.

Considered by McGiverin, C.J., and Harris, Neuman, Andreasen, and Ternus, JJ.

HARRIS, Justice.

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 382-83, 97 S. Ct. 2691,_____, 53 L. Ed. 2d 810, 835 (1977), states were denied authority to prohibit advertising by practicing lawyers. The question in this appeal, as we see it, comes down to whether, having submitted to the rule in *Bates*, states can adopt and enforce lawyer advertising rules to assure that, in addition to being reasonable, the advertising is forthright and accurate.

Attorney James C. Wherry was admitted to practice in 1991 and maintains a general practice in Davenport. Wherry has consistently advertised his practice in the areas of bankruptcy, domestic relations, wills, and social security appeals. He has never filed a report showing his eligibility to indicate areas of practice with the commission on continuing legal education as required by DR 2-105 (A) (4) of the Iowa code of professional responsibility for lawyers.[1] We have said

---

[1]DR 2-105 (A) (4) provides that a lawyer who wishes to advertise an area of practice must first comply with certain steps:

> Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) (listing various areas of practice], a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

a lawyer who advertises a practice in a specific field without compliance with DR 2-105(A)(4) acts unethically. *Committee on* Prof'l *Ethics & Conduct v. Morris*, 490 N.W.2d 806, 808 (Iowa 1992).

Wherry's advertisements in various telephone directories in violation of this rule prompted the present complaint by the board of professional ethics and conduct. Wherry testified he has continuing legal education hours and experience required to report eligibility for bankruptcy, but has taken no steps to do so. For the other areas he advertises, he had not met the practice time or the continuing legal education requirements. He had drawn only one or two wills before publishing an advertisement referring to wills. He had not obtained any continuing legal education in the areas of domestic relations, wills, or social security.

Wherry's noncompliance has been no mere oversight. He seems determined to confront our advertising rules; the

---

> (a) The lawyer must have devoted the greater of 200 hours or twenty percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and
>
> (b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study in each separate indicated field of practice during the preceding calendar year.

violations involved here follow a prior proceeding in which he was privately admonished by the board in 1993 for similar noncompliance.

I. As a preliminary claim, Wherry contends DR 2-105 (A) (4) is permissive, not mandatory. He concedes the rule states that an attorney must comply with the eligibility requirements before advertising. But he contrasts this with the introductory language in DR 2-105 (A) (2) which he says is made to only apply to lawyers who in fact "limit" practice to certain fields of the law.

DR 2-105(A)(2), before listing the areas of practice appropriate for specialty advertising, does refer to lawyers who limit practice to those areas or who wish to practice primarily in them. But no language in the rule provides the escape Wherry suggests because the rule is subject to the general authority for all lawyer advertising which allows informational but prohibits solely promotional advertisements. To distinguish between informational and promotional advertising, DR 2- 101 (C) then provides:

> Content (Informational). The following information shall be presumed to be informational and not solely promotional:
>
> (2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105.

Compliance with DR 2-105 (A) (4) is clearly required for all Iowa lawyers who advertise specific fields of practice. The requirement is not confined to those lawyers who would limit their practice as Wherry suggests.

II. Until two decades ago, state supreme courts were free to prohibit lawyer advertising. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770-71, 96 S. Ct. 1817, ___, 48 L. Ed. 2d 346, 363-64 (1976), the United States Supreme Court for the first time extended first amendment protection to commercial speech. The following year *Bates* held that lawyer advertising is commercial speech and entitled to limited first amendment protection. *Bates,* 433 U.S. at 383, 96 S. Ct. at,___, 53 L. Ed. 2d at 835.

The limited protection for commercial speech is less than afforded other forms of expression such as political speech. *Board of Trustees v. Fox,* 492 U.S. 469, 477, 109 S. Ct. 3028, 3033, 106 L. Ed. 2d 388, 402 (1989). Commercial speech by members of the learned professions, because it poses special problems, may justify more restrictions than would be appropriate for other commercial speech. *In re R.M.J.,* 455 U.S. 191, 202, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64, 73 (1982). Advertising by the legal profession may warrant even more restrictions than advertising by those of other learned professions. *Edenfield v. Fane,* 507 U.S. 761, ___, 113 S. Ct. 1792, ___, 123 L. Ed. 2d 543, 558 (1993).

The subject of commercial free speech rights for lawyers wishing to advertise was recently analyzed in *Florida*

Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), where it was said:

> [W]e engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 234-3, 65 L. Ed. 2d 341 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of these categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

Florida Bar, 515 U.S. at ___, 115 S. Ct. at____, 132 L. Ed. 2d at 549 (citations emitted).

We think our advertising rule easily satisfies the three-prong test. Iowa government, particularly its judicial branch, has a clear responsibility to protect the public interest in

informed selection of legal representation. False claims of expertise are a real danger to those who need and are searching for legal services. *Morris*, 490 N.W.2d at 808 (unqualified lawyer listing field of practice resulted in harm to client relying on the advertisement); *see also Bates*, 433 U.S. at 377, 97 S. Ct. at 2705, 53 L. Ed. 2d at 831 (recognizing substantial state interest in fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer).

DR 2-105(A)(4) is our carefully considered attempt to protect the public interest in making this informed decision. It does so by requiring a minimum of specialized training by those who pose in their advertising as specialists in a listed field. If we are to be criticized for our efforts, it might well be for drawing our requirements too narrowly-that is, for not requiring much more training. The rule was designed by striking a balance between-on the one hand-the public's right to have a lawyer qualified in the field advertised and--on the other hand-in not making the training requirements more onerous than we felt absolutely necessary to justify the advertised claims. The rule offers only limited protection, but the limitation was thought necessary in order to satisfy the third prong of the *Central Hudson* test. We think the rule is a reasonable accommodation. *See Edenfield*, 507 U.S. at 767, 113 S. Ct. at 1798, 123 L. Ed. 2d at 553 ("[L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive

First Amendment scrutiny.").

III. Wherry contends his advertisements are not misleading, that readers would not take them to mean he holds himself out as an expert, only that he performs professional services in the listed fields of practice. We are satisfied however that the advertisements were misleading because they would be taken by many readers as a claim of expertise in the listed fields. The record, as well as common sense, supports this view.

The record contains a summary of findings by the special master in the 1988 proceedings before our special commission which studied the subject and recommended approval of the challenged rule. A finding, which we accepted, was that "the public, in relying on listings of fields of practice, assumes that the attorney has additional education and expertise in the advertised field of practice." We adopted the rule in the hope it would bring a measure of reality to this assumption. Other courts have reached the same conclusion. *See Texans Against Censorship, Inc. v. State Bar of Texas,* 888 F. Supp. 1328, 1355 (E.D. Tex. 1995) ("Listing areas of practice in an advertisement is likely to give consumers the impression that the lawyer specializes or focuses his particular practice in that area"), aff'd *sub nom., Texans v. State Bar of Texas, 100 F.3d* 953 (5th Cir. 1996); *Lyon v. Alabama State Bar,* 451 So. 2d 1367, 1373 (Ala. 1984) ("[I]t is reasonable to assume: that some readers of an advertisement . . . might believe that the attorney is a specialist or has greater expertise in performing the services advertised than attorneys who do

not advertise."); *In re Golden*, 689 S.W.2d 869, 870 (Tenn. 1985) ("This court is convinced that many consumers and potential consumers of legal services in Tennessee believe that the mere listing, in advertisements, of specific areas of legal practice implies specialization, certification or expertise beyond that of the average lawyer.").

Those reading Wherry's advertisements implying experience in wills were misled because, at the time, he had only drawn one or two. He was similarly lacking in most of the fields mentioned in his advertisements. We thus conclude that advertising by an Iowa lawyer in fields of practice without the training required in accordance with our rule is misleading. We disagree with Wherry's contention that it is only *potentially* misleading. So saying, we do not suggest Wherry's view would make his case stronger because we are authorized to protect the public from advertisements that are only potentially misleading. Committee on *Prof'l Ethics & Conduct v. Humphrey*, 377 N.W.2d 643, 646 (Iowa 1985) (upholding restriction on electric media advertising noting that we claim "a substantial governmental interest in regulating what we perceive as a very real potential for abuse"), *appeal dismissed for want of substantial federal question*, 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986); *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629, 105 S. Ct. 2265, ___, 85 L. Ed. 2d 652, 658-59 (1985) (affirmatively answering question of whether a state "may seek to prevent *potential* deception of the public by requiring attorneys to disclose in their advertising certain

information regarding fee arrangements") (emphasis added); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454, 98 S. Ct. 1912, 1917, 56 L. Ed. 2d 444, 452 (1978) ("The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed . . . as posing a significant *potential* harm to the prospective client.") (emphasis added).

Wherry relies on *In re R.M.J.*, a case we find not in point. *R.M.J.* involved an absolute ban on advertising fields of practice except by language specified by the rule. *In re R.M.J.*, 455 U.S. at 193, 102 S. Ct. at ___, 71 L. Ed. 2d at 68. Our ban is not so absolute. Iowa lawyers, after meeting the eligibility requirements, are free to advertise within reasonable limits.

IV. Wherry also contends rule DR 2-105 (A) (4) violates two clauses of the United States Constitution and is also preempted by federal bankruptcy law. First he asserts DR 2-105 (A) (4) violates article 1, section 8 for the United States Constitution (commerce clause). Because Wherry derives at least twenty percent of his employment from Illinois, he contends the regulation imposes a substantial and excessive burden on interstate commerce. Wherry does not show how his right to practice in interstate commerce is affected by the challenged rule. He continues to practice in both Iowa and Illinois. Wherry can claim the rule restricts his ability to advertise but such a restriction does not impose a substantial and excessive burden on interstate commerce. He maintains his office in Iowa and eighty percent of his practice occurs

here. We reject the challenge.

He further asserts the professional responsibility rule is preempted by "any of the various interstate telephone and communication acts." Wherry also claims the rule is an unconstitutional regulation of bankruptcy in violation of article 1, section 8 of the United States Constitution. He cites no authority for either proposition. We find none and reject them both.

V. Wherry next asserts DR 2-105(A)(4) violates equal protection as guaranteed by the fourteenth amendment of the United States Constitution, an assertion we also reject.[2] The rule treats all lawyers the same, and all lawyers are subject to it. Equal protection requires only that those in similar positions be treated alike. *Bruns v. State*, 503 N.W.2d 607, 610 (Iowa 1993). In rejecting the argument on this basis, we do not imply that the equal protection analysis is even applicable when a commercial speech issue was justiciable in the claim, a matter we do not decide. *See United States v. Edge Broad. Co.*, 509 U.S. 418,___ , 113 S. Ct. 2696, ___, 125 L. Ed. 2d 345, 353 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 331, 337-38, 106 S. Ct. 2968, 2971, 2975, 92 L. Ed. 2d 266, 274, 278 (1986).

VI. The closest question is with the recommended

---

[2]Wherry seems to make a separate argument that the challenged rule lacks a rational basis. Although he did not so state, we assume the argument stands on his equal protection claim and falls with it.

sanctions--a public reprimand. In view of his prior private admonition for violating the same rule, Wherry's obdurate stand cannot be ascribed to a lack of experience. Neither can it be attributed alone to his desire to mount a constitutional test. A "safe harbor" was available to him. *Committee on* Prof'l *Ethics & Conduct v. Humphrey*, 355 N.W.2d 565, 569 (Iowa 1984) (safe harbor administrative system available for challenging advertising rules), *vacated on other grounds*, 472 U.S. 1004, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

With some reservations, we adopt the recommendation. For any future violations, we will take into consideration both Wherry's admonition and this reprimand.

James C. Wherry is reprimanded for his unprofessional conduct in violating DR 2-105 (A) (4) of the Iowa code of professional responsibility for lawyers.

ATTORNEY REPRIMANDED.

APPENDIX B

GRIEVANCE COMMISSION
OF THE
SUPREME COURT
OF THE
STATE OF IOWA

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION
FILED, APRIL 22, 1997

BEFORE THE GRIEVANCE COMMISSION
OF THE SUPREME COURT OF IOWA

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS & CONDUCT, Complainant,	)	Docket No. 401
vs.	)	
JAMES C. WHERRY, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

This matter came on for a hearing before the 125th Division of the Grievance Commission. Commission members who heard the evidence were: Richard S. Fry, Candice A. Wilcox, Charles M. Kiple, Cathy Whittlesey, and Margaret T. Lainson, as President of the Division. Complainant was represented by attorney Charles L. Harrington. The Respondent was present and represented himself.

Evidence was received and arguments heard. By agreement of the parties, the record was left open in order that an Affidavit from Norman F. Bastemeyer could be submitted. In addition, Complainant was hoping to obtain a transcript of a public hearing which was held in 1988 pertaining to

proposed changes to the Supreme Court Professional Responsibility Disciplinary Rules. The Bastermeyer affidavit has been received. The 1988 transcript was not provided to the division.

Both sides filed briefs. The complainant filed a reply brief.

FINDINGS OF FACT

The Respondent, James C. Wherry is an attorney licensed to practice law in both Iowa and Illinois. At all times relevant to the issues before the Grievance Commission Panel, Mr. Wherry's primary place of business has been in Scott County, Iowa. He testified that approximately 80% of his law practice occurred in Iowa and 20% in Illinois.

Mr. Wherry is a graduate of the University of Iowa College of Law. He received his degree in 1991 and was licensed in June of that year. Respondent testified that while in law school, he focused his attention on courses involving commercial transactions. During law school he was a research assistant for both professor Burns Weston and professor Patrick Bauer. Upon graduation from law school, Mr. Wherry was a law clerk for Judge William Edmunds, bankruptcy judge of the Northern Judicial District of Iowa. Mr. Wherry began his private practice in Davenport, Iowa in 1992.

In the complaint, as amended, the Iowa Supreme

Court Board of Professional Ethics and Conduct alleges that Mr. Wherry has violated DR2-105 in that he has advertised in telephone directories in various areas (bankruptcy, wills, divorce, and social Security appeals) without having complied with the certification requirements of DR2-105. Mr. Wherry acknowledged that he had not complied with the certification requirements and further admitted that he had advertised in the yellow pages of the various telephone directories as alleged by the Board.

The panel believes it appropriate to recite some of the background information which was presented at the hearing. The evidence established that James Wherry has a quite extensive background in the area of bankruptcy. As stated above, he served as a clerk for the Honorable William Edmunds, bankruptcy judge of the Northern District of Iowa. Mr. Wherry testified that approximately 60% of his practice is in the area of bankruptcy. He has been active and has joined several professional organizations focusing on bankruptcy matters. James Wherry testifies that he is the author of two articles which have been published in professional journals.[3] In addition he was coauthor of a paper

---

[3]Wherry Commentary: The 1992 Amendment of Iowa's Pension Benefit Exemption 92 Iowa Law Alert 92-76 (Iowa 1992).

Wherry, Support Obligations and Student Loans in Chapter 13: A Look at Unfair Discrimination 6NACTT, 19 (April, 1994)

Goodman and Wherry. Drafting Chapter 13 Plans Lecture

which was presented along with a lecture at the meeting of the Federal Bar Association Bankruptcy Conference held in Des Moines, Iowa in October, 1994. Mr. Wherry testified that he is involved in approximately 30 bankruptcy matters each month. Mr. Wherry testified that he is now in compliance with the eligibility requirements to advertise as a specialist in bankruptcy, but he had not filed the proper documents to comply with the eligibility requirements of DR2-105(A)(4). He did not indicate at the hearing that he planned to make this application.

Mr. Wherry testified that he began to advertise in the yellow pages of phone books his availability to practice in the field of bankruptcy shortly after he began his private practice in 1992.

James Wherry testified that he believes he began advertising his availability to practice in the area of "wills" and "divorce" one year later. At the time he began advertising his availability to practice in the area of "wills" he had drawn only one or two wills. According to Wherry's testimony, he had been involved in 10-20 divorce cases before he began his telephone directory advertising. Respondent testified that at the current time he believes that approximately 10% of his practice is in the family law area. He believes that he has drawn approximately 20 wills in the five and a half years he

---

and Paper 1994 Annual Federal Bar Association Bankruptcy Conference in Des Moines, October 1994.

has been in private practice. James Wherry testified that he views himself as competent in both the area of wills and the area of divorce.

In 1993 or 1994 James Wherry received a private admonition from the Committee on Professional Ethics and Conduct of the Iowa Bar Association. This private admonition was based upon the telephone directory advertising which James Wherry was doing at that time. After receiving the private admonition, Mr. Wherry continued with his telephone directory advertising. In 1996, James Wherry also began to advertise that he was available to practice in the field of Social Security appeals.

As stated earlier, James S. Wherry stipulated that he was in violation of DR2-105(A)(4). It is his position that the disciplinary rule, as written and as enforced, violates his rights under the United States Constitution to commercial free speech. As more fully set forth in his Answer and in the Brief filed with the Commission panel, James Wherry claims that the disciplinary rule does not promote a substantial governmental interest and that it is not narrowly drawn. In addition Mr. Wherry claims that no specific wrong is being done.

CONCLUSIONS OF LAW

The burden of proof upon the complainant to sustain a finding of a disciplinary violation is to show such a violation by a convincing preponderance of the evidence.

This is a greater quantum of evidence than is required in a civil trial, but less than that which is required to sustain a conviction in a criminal case. Committee on Professional Ethics and Conduct v. Garrison, 515 N.W.2d 25 (Iowa 1994). A prior sanction and past misconduct may be considered on the issue of sanctions. Committee on Professional Ethics and Conduct v. Raney, 512 N.W.2d 569 (Iowa 1994). The violation of the disciplinary rule is not at issue in this case. Defendant has stipulated that his conduct is in violation of the rule. The justification and legal basis for his actions have been set forth in his testimony, his pleadings and his brief.

It is the opinion of this panel, that we do not have the authority to make a determination as to the constitutionality of a disciplinary rule of the Iowa Supreme Court. That decision rests with other bodies. A violation of a disciplinary rule has been admitted. The action taken by this panel is based upon the admission by Respondent of a violation of DR2-105.

RECOMMENDATION

In making its recommendation, the Commission is mindful of the fact that many attorneys advertise in the yellow pages of phone books. Numerous ads, including those of Respondent were entered into evidence in this matter. The panel is also aware of the fact that Respondent had previously received a private admonition from the Committee on Professional Ethics and Conduct of the Iowa Bar Association

and that after receiving this private admonition, the Respondent did not cease his conduct in violation of the disciplinary rule.

Based upon the admitted violation of the disciplinary rule and the past private admonition, it is the unanimous recommendation of this panel that Respondent James S. Wherry receive a public reprimand for his violation of the duty. The recommendation of the panel being unanimous, each of the members of this division of the Grievance Commission has empowered the President of the Division to sign and file these Findings of Fact, Conclusions of Law and Recommendation on behalf of the Division.

DATED this 17th day of April, 1997.

THE GRIEVANCE COMMISSION OF
THE SUPREME COURT OF IOWA
ONE HUNDRED TWENTY-FIFTH DIVISION

/s/ Margaret Lainson
By: Margaret Lainson
President

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

RELATED CASE OPINION

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JAMES C. WHERRY,	*	
on behalf of himself	*	
and others similarly situated,	*	
Plaintiff,	*	CIVIL NO. 3-95-70005
	*	
v.	*	
	*	MEMORANDUM
THE IOWA STATE	*	OPINION, RULING
SUPREME COURT	*	GRANTING MOTION
BOARD OF	*	TO DISMISS IN PART,
PROFESSIONAL ETHICS	*	AND GRANT OF
AND CONDUCT, et al.,	*	TIME TO SHOW
Defendants	*	CAUSE
	*	

James Wherry brings suit against the Iowa State Supreme Court Board of Professional Ethics and Conduct ("Ethics Board"); Norman Bastemeyer, as administrator of the Ethics Board; the Honorable Arthur A. McGiverin, Chief Justice of the Iowa Supreme Court; and the State of Iowa. Wherry, a lawyer licensed to practice in Iowa, contends that various rules relating to lawyer advertising contained in the Iowa Code of Professional Responsibility are

unconstitutional. He seeks an order enjoining enforcement of these rules. Defendants move to dismiss and plaintiff resists. The motion is submitted.

Background

The Iowa Code of Professional Responsibility for Lawyers ("Code") sets forth standards of conduct and ethical principles to be used as a guide for lawyers in practicing law and as a basis for disciplinary action for lawyers who fail to meet the Code's minimum standards. Enforcement of the Code is a three-step process. The Ethics Board, consisting of seven lawyers and two lay persons appointed by the Iowa Supreme Court, is responsible for initiating, receiving, and processing complaints.[4] After investigating a complaint against an attorney the Ethics Board either dismisses the complaint, admonishes or reprimands the attorney, or files and prosecutes a complaint against the attorney before the Grievance Commission of the Iowa Supreme Court. Iowa Sup.Ct.R. 118.2. if the Board admonishes an attorney, there is no provision in the Rules for review by the Grievance Commission.

---

[4]The Board was created on January 3, 1995. See Iowa Sup.Ct.R. 118.2. Before that date, the functions of the Board were performed by the Committee on Professional Ethics and conduct of the Iowa State Bar Association. To avoid confusion, the body that initiates the disciplinary process and processes complaints will be referred to as the "Ethics Board," including pre-1995 actions that were in fact performed by the Committee on Professional Ethics and Conduct of the Iowa State Bar Committee.

The Grievance commission also is comprised of attorneys and lay persons appointed by the Iowa Supreme Court. Iowa Sup.Ct.R. 118.1. After the Ethics Board files a complaint with the Grievance Commission, the Commission holds evidentiary hearings and either dismisses the complaint, privately admonishes the attorney, or recommends to the Iowa Supreme Court that the attorney be reprimanded or that the attorney's license to practice be suspended or revoked. Iowa Sup.Ct.R. 118.7-9. If the Grievance Commission recommends a reprimand, suspension, or revocation, a "report" is filed with the Iowa Supreme Court and the case is reviewed de novo. Iowa Sup.Ct.R. 118.9. If the Grievance Commission dismisses the complaint or issues a private admonition, no report is made to the Supreme Court, though all dispositions are filed with the Court. Iowa Sup.Ct.R. 118.9. The Rules have no provision that would allow an attorney to appeal to the Iowa Supreme Court from a Grievance commission determination that he be privately admonished. Whether the attorney could obtain review by the Iowa Supreme Court using some form of action or procedural mechanism is not addressed by the parties.

The controversy in this case involves the Code's regulation of lawyer advertising. one such provision of the Code states that before a lawyer may advertise a specific practice area, he must file a report with the Commission on Continuing Legal Education to demonstrate that the lawyer devoted the greater of 200 hours or twenty percent of the

lawyer's time to the specified practice area for the past two years, and that the lawyer completed at least ten hours of Continuing Legal Education courses in the specified practice area. DR 2-105 (A) (4) . In addition, the Code states that if a lawyer advertises a specific practice area, he may not also advertise that he has a "general practice." DR 2-105(B).

In 1993, Wherry placed an ad in the Quad Cities, Iowa, U.S. West Direct Yellow Pages that stated, among other things, the following: "Available to Practice in But Not Limited to Bankruptcy." Directly below the word "bankruptcy" the ad contained the phrase "General Practice." Wherry had not complied with the reporting requirements of DR 2-105(A)(4). Wherry was notified by the Ethics Board that his ad was in violation of DR 2-105 (A) (4) and DR 2-105(B) of the Code and was ultimately privately admonished by the Ethics Board. The Ethics Board did not file a complaint against Wherry with the Grievance Commission and the matter was ended.

Wherry then placed an ad in the 1994 phone book. The ad again contained the language that he was available to practice in bankruptcy, and in addition, listed the specific practice areas of child support, divorce, and wills. The new ad also contained the phrase "general practice." On December 28, 1994, the Ethics Board notified Wherry that his ad appeared to be in violation of the same code provisions and that the Ethics Board was initiating an investigation. The Ethics Board asked Wherry to submit a response on the day

his response was due, Wherry filed his complaint in this court. Wherry contends that the advertising rules he is alleged to have violated, as well as other, unrelated advertising rules contained in the Code, are unconstitutional. He seeks an order enjoining enforcement of these rules. His request for a temporary restraining order enjoining enforcement of the Code's advertising rules was denied by the court on January 20, 1995.

Discussion

Defendants contend the case should be dismissed under the doctrine of Younger abstention. Younger v. Harris, 401 U.S. 37 (1991). While federal courts have a "virtually unflagging obligation" to exercise their jurisdiction, this jurisdiction is limited by principles of equity, comity, and federalism. Deakins v. Monaghan, 484 U.S. 193, 206 (1988) (citation omitted); see also Alleghany Corp. v. McCartney, 896 F.2d 1138, 1142 (8th Cir. 1990) . The Younger abstention doctrine holds that, absent extraordinary circumstances, federal courts should not enjoin pending state criminal proceedings.

> The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their

separate functions in their separate ways."
Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (citations omitted) . The Younger doctrine also applies to noncriminal cases if: (1) there is an ongoing state judicial proceeding; (2) important state interests are at stake; and (3) there is an adequate opportunity to raise constitutional challenges in the state proceedings. See Middlesex at 432; Alleghany, 896 F.2d at 1142.

Wherry argues that Younger does not apply in this case because the third prong of the analysis is not met. He contends that he has no opportunity to raise his constitutional claims because neither the Ethics Board nor the Grievance Commission can consider the constitutionality of the rules they enforce, and further, that the Ethics Board and Grievance Commission could choose to privately admonish him which is an unappealable sanction that would prevent him from raising his constitutional claims with the Iowa Supreme Court. In support of his claim that the Ethics Board and Grievance commission cannot consider constitutional challenges, Wherry states only that counsel for defendants conceded this point at a hearing on his motion for a temporary restraining order. Defendants state that they made no such concession. Their position is that the Ethics Board and the Grievance Commission can consider constitutional claims but that the Iowa Supreme Court would ultimately decide those claims if appealed. Wherry points to nothing in Iowa's statutes or Supreme Court Rules that would bar these bodies

from considering a constitutional claim.

The following passage from Middlesex, also a case involving attorney disciplinary proceedings, applies equally to Wherry's situation:

> Respondent Hinds contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds failed to respond to the complaint filed by the local Ethics Committee and failed to even attempt to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committee constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. Abstention is based upon the theory that "the accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would

not afford adequate protection."

Middlesex, 423 U.S. at 435 (emphasis original) (citations omitted).

Like the attorney in Middlesex, Wherry fails to demonstrate that the members of the Ethics Board and Grievance Commission, the majority of whom are lawyers, would refuse to consider his constitutional challenge to the rules they are *enforcing*. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 629(1986) (state administrative commission would presumably "construe its own statutory mandate in the light of federal constitutional principles"). Wherry has made no showing that he even attempted to raise his constitutional claims, either in the current state proceeding or in his first encounter with the Ethics Board. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1986) (" [W] hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."). Finally, because Wherry has already been privately admonished for placing an ad in violation of the Code, the likelihood that he will again receive that sanction, while of course possible, is far from certain. In all probability then, in addition to raising his constitutional claims before the Ethics Board and Grievance Commission, Wherry will ultimately be able to raise them before the Iowa Supreme Court as well. In view of the above, I cannot conclude that

the Iowa scheme does not provide Wherry with an "adequate opportunity" to raise his constitutional claims.

Wherry argues in the alternative that even if the Younger doctrine has some application in this case, it cannot be applied to those allegations in his complaint that are unrelated to the Ethics Board's complaint and investigation. For instance, Wherry challenges the constitutionality of various Code provisions that regulate lawyer advertising in the electronic media. Because these issues are not part of the proceeding before the Ethics Board, he argues, he has no opportunity to raise his constitutional claims as to these rules and therefore the Younger doctrine cannot apply.

The court need not address this argument at this time because as to those Code provisions that are not part of the state proceedings, Wherry has failed to allege a sufficient "injury" to present a justiciable question to this court. Article III of the Unites States Constitution limits the "judicial power" to the resolution of "cases" and "controversies." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). "At a minimum, Article III 'requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Goos v. I.C.C., 911 F.2d 1283, 1287 (8th Cir. 1990) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). A party must allege "such a personal stake in the outcome of the

controversy as to assure the concrete adverseness which sharpens the presentation of issues." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978). The injury in fact requirement "serves to distinguish a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem." National Wildlife Fed'n v. Agricultural Conservation and Stabilization Serv., 901 F.2d 673, 677 (8th Cir. 1990).

Aside from the Code provisions that are the subject of the disciplinary proceedings before the Ethics Board, Wherry fails to sufficiently allege any actual or threatened injury from the enforcement of the Code provisions he challenges. It is my conclusion then that the complaint, insofar as it relates to the Code provisions that are the subject of the state disciplinary proceedings, must be dismissed under the Younger doctrine. Insofar as the complaint challenges Code provisions that are not part of the state disciplinary proceedings, Wherry will be granted time to show cause why the complaint should not be dismissed for lack of standing. The court will address the possible application of the Younger doctrine to these remaining claims, if necessary, at that time.

Ruling and Order

The motion to dismiss, filed by defendants on January 23, 1995, is **GRANTED** as it relates to plaintiff's claims challenging the constitutionality of DR 2-105(A) (4) and DR 2-105(B) of the Iowa Code of Professional Responsibility. The court reserves ruling on the motion as it applies to the

remainder of plaintiff's claims. **IT IS ORDERED** that plaintiff's claims challenging the constitutionality of DR 2-105 (A) (4) and DR 2-105 (B) of the Iowa Code of Professional Responsibility be **DISMISSED.**

IT IS FURTHER ORDERED that plaintiff has until on or before May 19, 1995, within which to show cause why the complaint should not be dismissed for lack of standing. Defendants are granted to and including fourteen days from the date plaintiff files his brief within which to file a response.

Dated this 5 day of May, 1995.

/s/ Harold D. Vietor
HAROLD D. VIETOR, District Judge
Southern District of Iowa

APPENDIX D

IOWA RULES OF COURT

DISCIPLINARY RULES

DISCIPLINARY RULES

DR 2-101. PUBLICITY

(A) Advertising in General. A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2-101 and DR 2-102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable", "moderate", and "very reasonable", but shall avoid all unrestrained subjective characterizations of rates or

fees, such as, but not limited to, "cut-rate", "lowest", "give-away", "below-cost", "discount", and "special". All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

(B) Method of Dissemination. Subject to the limitations contained in these rules:

(1) General Print Media. Lawyer advertising may be communicated to the public in newspapers, periodicals, trade journals, "shoppers", and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, PROVIDED THAT the publisher agrees in writing to print all the disclaimers required by these rules in type size not smaller than 9-point on each page bearing the ad.

(2) Lawyer Telephone and City Directory Listings. A lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The lawyer's name, address, and telephone number and designation as a lawyer, only, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys" except that a lawyer who has complied with DR 2-105(A)(4) may be listed in no more than three classifications or headings identifying those fields or areas of practice as fisted in DR 2-105(A)(2). By further exception, a lawyer qualified under DR 2-105 to practice in the field of taxation law also may be listed under the general heading "Tax Preparation" or "Tax Return Preparation," either in lieu of or in addition to, the general heading "Lawyers" or "Attorneys". The disclaimers required by these rules must also appear under any heading in which the lawyer is listed.

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertisements, shall include the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published as provided in DR 2-101(B)(1).

(3) Law Firm Telephone and City Directory Listings. A law

firm, all of whose lawyers are licensed to practice law in Iowa, may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The firm name, a list of its members, address, and telephone number, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2) in which one or more members of the firm are qualified.

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertising, may contain the firm name, address, and telephone number, and the names of the individual lawyer members of the firm. All display or box advertisements shall include within the ad the disclosures required by DR 2-101(A), (D), and firm unless such disclosures are published as provided in DR 2-101(B)(1).

(4) *Solicitation.*

(a) In-Person Solicitation. A lawyer may not engage in the in-person or telephone solicitation of legal business under any circumstance.

(b) Written Solicitation. A lawyer who wishes to engage in written solicitation by direct mail to persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could upon reasonable inquiry be known to the soliciting lawyer shall, prior to the dissemination of the solicitation, file all such proposed written documents or solicitations with the committee on professional ethics and conduct of the Iowa State Bar Association. The soliciting lawyer shall, in addition thereto, bear the burden of proof regarding:

(i) the truthfulness of all facts contained in the proposed communication;

(ii) how the identity and specific legal need of the potential recipient were discovered; and

(iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

All such written solicitations shall contain the disclosures required by DR 2-101(A), (D), and firm No such dissemination shall be made until the committee or its designee shall, upon the facts presented, render a written

finding that the solicitation is not false, deceptive, or misleading. No information disseminated by the soliciting lawyer shall make any reference to such submission and finding. Each separate written solicitation intended for dissemination must be submitted for a finding in accordance herewith.

(c) Direct Mail. Information permitted by these rules may be communicated by direct mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. All such communications shall contain the disclosures required by DR 2-101(A), (D), and (F).

(d) All communications authorized by paragraphs by and "c" hereof and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in 9-point or larger type: "ADVERTISEMENT ONLY". A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, contemporaneously with the mailing of the

communications to the general public and shall contain the disclosures required by DR 2-101(A), (D), and (F).

(5) Electronic Media. Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, and shall contain the disclosures required by DR 2-101(A), (D), and (F) and DR 2-105(A)(3).

(6) Biographical and Informational Brochures. Brochures or pamphlets containing biographic and informational data as permitted by these rules, shall only be disseminated directly to clients, members of the Bar, or in response to direct request, and shall include the disclosures required by DR 2-101(A), (D), and (F), and DR 2-105(A)(3).

(7) Record Retention. Whether or not it contains fee information, a lawyer shall preserve a copy of each advertisement placed in a newspaper, the classified section of the telephone or city directory, or periodical, and a tape of the

radio, television, or other electronic or telephonic media commercial, or recording, for at least three years and a record of the date or dates and name of the publication in *which* it appeared or the name of the medium through which it was aired.

(C) **Content (informational).** The following information shall be presumed to be informational and not solely promotional:

(1) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer .... .. attorney", "law firm", or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments in bar associations;

(11) Memberships and offices in legal fraternities and legal societies;

(12) Technical and professional licenses; and

(13) Memberships in scientific, technical, and professional associations and societies.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

If the publication of any of the foregoing items (1) through (13) inclusive would indicate an area or field of practice such as, but not limited to, those set out in DR 2-105(A)(2), there shall be contained within such communication and contained in any electronic media communication the disclosure required by DR 2-101(A) and also a "notice to the public" in the following form:

> Memberships and offices in legal fraternities and legal societies, technical and professional licenses, and memberships in scientific, technical and professional associations and societies of law or field of practice does not mean that a lawyer is a specialist or expert in a field of law, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.
>
> All potential clients are urged to make their own independent investigation and evaluation of any

lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

(D) Content (Fee Information). The following fee information may be communicated to the public in the manner permitted by DR 2-101(B):

(1) Fee for an initial consultation;

(2) Availability upon request of either, a written schedule of fees, or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and ad-vises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; and

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement discloses:

(a) That the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to

a specific written estimate of the fees likely to be charged.

All such information shall be presented in a dignified manner.

Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone or city directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall within the described services. In that event or if a range of fees is stated, the lawyer shall render the service for the estimated fee given the client in advance of rendering the service.

A lawyer shall not, individually or on behalf of a law firm or association, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom the lawyer performs other legal services not related to the specific legal services publicized.

(E) Content (Specific Legal Services). For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not

including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support or property settlement [see DR 5-105(A) 1;

(3) 'Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds:

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;

(11) Powers of attorney; and

(12) Bills of sale.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or constricting the above list of "specific legal services". In considering such amendments the committee shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

(3) The service does not normally involve a substantial amount of legal research. drafting of unique documents, investigation, court appearances, or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(F) Content (Institution of Litigation). In the event that the communication seeks to advise the institution of litigation, the communication must also disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so

filing liable for malicious prosecution or abuse of process.

(G) Content (Designation as Legal Clinic or Center). The term "clinic", "center", or any other similar term shall not be used in any communication to the public unless the practice of the lawyer or the lawyer's firm is limited to specific matters as described in DR 2-101(E) for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures.

(H) A lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize, permit, or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(I) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when the professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential

clients;

(3) In routine reports and announcements of a bona ride business, civic professional, or political organization in which the lawyer serves as a director or officer;

(4) In and on legal documents prepared by the lawyer;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(J) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

(K) All disclosures required to be published by these rules shall be in 9-point type or larger.
[Effective July 1, 1993; amended effective July 1, 1994.1

DR 2-102. PROFESSIONAL NOTICES, LETTERHEADS, OFFICES, AND SIGNS

(A) A lawyer or law firm shall not use professional cards, signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from personal participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (4), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as such activities do not emphasize the lawyer's own professional experience or reputation and the lawyer does not undertake to give individual advice,

(5) If success in asserting rights or defenses of a client

in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder. [Effective July 1, 1993.]

DR 2-105. DESCRIPTION AND LIMITATION OF PRACTICE

(A) A lawyer may be identified as practicing in or limiting practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card,

letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents", "Trademarks", or "Copyright Law" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Law
Admiralty Law
Alternate Dispute Resolution
Antitrust and Trade Regulation
Appeals
Banking
Commercial and Retail Collections
Constitutional Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Law

Domestic Relations and Family Law
Environmental Law
Health Law
Immigration Law
Insurance Law
International and Foreign Law
International Trade and Investment
Discrimination and Civil Rights Law
Labor Law

Malpractice or Professional Negligence
Military Law
Municipal Law
Pension and Profit Sharing Law
Personal Injury Law
Product Liability Law
Public Utility Law
Real Estate Law
Securities Law
Social Security Disability
Taxation Law
Trademarks and Copyright Law
Trial Law
Wills, Estate, and Probate Law
Workers' Compensation Law.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of

the supreme court as provided by court rule 118 on its own motion or upon the request of a lawyer admitted to practice in this state. shall, from time to time consider and recommend to the Court proposed amendments to these rules expanding or restricting die permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2-105(A)(2) shall only be in the following manner.

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice. such listing of fields of law practice shall be preceded by the words "practice limited to . . . ."

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but' also accepts other types of legal matters. such listing of fields of law practice shall be preceded by the words "practicing primarily in . . . ."

(c) In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers. periodicals, or legal directories, there shall be contained within such communication, or prominently displayed on the same page of such communication, and contained in am electronic media communication the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

"A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.

All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers." except as provided in DR 2-101(B)(2)(b).

(4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2), a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or twenty percent of the lawyer's time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years: and

(b) The lawyer must have completed at least ten. hours of accredited Legal Education courses of study in each separate indicated of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a). a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) If advertising uses the term general practice, no reference to limited or restricted areas of practice is permitted. If areas of practice under DR 2-105 are advertised. the term general practice may not be used.

(C) The nature of one's professional practice. the types of cases or matters handled. may not described other than as permitted by DR 2-105 and DR

(D) If, due to hardship or extenuating circumstances. a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by D R 2-105(A)(4)(b), the lawyer may apply to the commission on continuing legal education for an extension of time in which to complete the hours. No extension of time shall be granted unless written application, here for shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the

minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

[Effective July 1, 1993.]

Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

(2)

No. 97-1200

In The

Supreme Court of the United States

October Term, 1997

JAMES C. WHERRY,

Petitioner,

vs.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. HARRINGTON
Counsel of Record
521 East Locust St., Fl. 3rd
Des Moines, IA 50309-1939
(515) 243-0027
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether a limited restriction on lawyer advertising, designed to protect the public from misleading or potentially misleading lawyer advertisements, warrants review by this Court when viewed in light of the actual record made below.

2. Whether a reasonable restriction on lawyer advertising, which applies without distinction to all lawyers in the state, presents any issue of equal protection.

3. Whether Petitioner was denied due process when he was allowed a full and fair opportunity to present evidence and argue all federal constitutional issues before the state court.

4. Whether Petitioner's claim that he was denied due process by the state court's consideration of his receipt of a prior disciplinary admonition was preserved and has merit, where Petitioner failed to cite authority in the state proceedings and admitted the facts on which the prior admonition was based.

TABLE OF CONTENTS

Page

Counter Statement of Questions Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 5

I. The Limited Restriction on Lawyer Advertising Imposed by the Iowa Rules is Permissible under the First Amendment and this Court's Decisions in Light of the Record Actually Made Below .. 5

II. The Disciplinary Rule Applies to All Lawyers in Iowa and Presents No Issue of Equal Protection 10

III. Petitioner Had a Full and Fair Opportunity to Present His Federal Constitutional Challenges for Resolution by the Iowa Supreme Court and Therefore Was Not Denied Due Process 13

IV. Petitioner's Due Process Challenge to the Iowa Court's Consideration of a Prior Admonition He Received for Similar Misconduct (Which He Admits Committing) Has Been Waived and is Without Merit 15

Conclusion 17

Appendices

DR 2-105 ..... A-1

Portions of Iowa Sup.Ct.R. 118..... A-7

Iowa R.App.P. 14(a)(3) A-10

TABLE OF AUTHORITIES

Page

CASES:

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 819 (1977) 9

Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 8

Committee on Professional Ethics & Conduct v. Kaufman, 515 N.W.2d 28 (Iowa 1994) 14

Committee on Professional Ethics & Conduct v. Morris, 490 N.W.2d 806 (Iowa 1992) 6

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 9

Florida Bar v. Went For It., Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) 7, 9

In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) 8, 9

Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) 11

United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) 7, 11

United States v. Watts, ___ U.S. ___, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) 16

CONSTITUTIONAL PROVISIONS:

U.S. CONST., amend. I 5, 10

U.S. CONST., amend. V 15

TABLE OF AUTHORITIES – Continued

Page

RULES:

Iowa Code of Professional Responsibility for Lawyers, DR 2-101(C) 12

Iowa Code of Professional Responsibility for Lawyers, DR 2-101(E) 12

Iowa Code of Professional Responsibility for Lawyers, DR 2-105 2

Iowa Code of Professional Responsibility for Lawyers, DR 2-105(A)(4) ..... *passim*

Iowa R.App.P. 14(a)(3) 2, 15

Iowa Sup.Ct.R. 118.2 ..... 2, 14

Iowa Sup.Ct.R. 118.5 ..... 2, 14

Iowa Sup.Ct.R. 118.10 ..... 2, 14

Iowa Sup.Ct.R. 118.11 ..... 2, 14

OTHER AUTHORITIES:

ABA Commission on Advertising *Lawyer Advertising at the Crossroads* (1995) 2, 3

Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L.Rev. 179, 248 (1991) 3

STATEMENT OF THE CASE

This case is about a lawyer who easily could have complied with a limited regulation designed to protect the public from being misled about the qualifications of lawyers who advertise practice in particular fields of law. Nothing in the record substantiates the claim that the rule at issue has harmed the public or the lawyers of Iowa or that the limited restriction in question is unduly burdensome. The reasonableness and constitutionality of the rule in question are shown by the record below. Petitioner has failed to present a compelling reason for review.

Respondent Iowa Supreme Court Board of Professional Ethics and Conduct ("Board") charged Petitioner with advertising his practice in certain areas of law without complying with Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(4). This disciplinary rule prescribes a minimum of experience (the greater of 200 hours or twenty percent of the lawyer's practice time must have been in the pertinent field in each of the two preceding calendar years) and training (at least ten hours of continuing legal education in the field during the preceding calendar year) before a lawyer may advertise practice in the field. The rule further requires that the advertising lawyer certify his or her eligibility in a report filed with the Continuing Legal Education Commission of the Supreme Court of Iowa. (The full text of the rule is set forth in Resp. A- 4-5.)

Petitioner had no continuing legal education in three of the areas he listed – domestic relations, wills, and social security appeals. And he admits he had drawn only

one or two wills prior to advertising his practice in that field.

The general factual background is summarized in the Iowa Supreme Court's opinion. (Pet. A- 2-3.) The Board will refer to further facts as necessary to address omissions or correct misstatements in Petitioner's statement of facts.

The version of the Iowa Code of Professional Responsibility for Lawyers in Appendix D of the Petition is not current in some respects. The present version of DR 2-105, which includes the provision at issue here, is set forth in the first appendix to this brief. Iowa Sup.Ct.R. 118.2, 118.5, 118.10, and 118.11, pertaining to disciplinary procedure, and Iowa R.App.P. 14(a)(3) are relevant to Petitioner's due process claims, and are included in the second and third appendices, respectively, to this brief.

Petitioner's characterization of Iowa's lawyer advertising rules as "abolitionist" (Pet. 8) is hyperbole. Iowa telephone directories contain page after page of lawyer advertisements.[1]

Nor does Iowa impose a *ban* on area of practice advertisements. Iowa has chosen the less restrictive approach of requiring lawyers to meet certain minimum

---

[1] Petitioner derived the term "abolitionist" from language in an American Bar Association study. In context, the only advertising said by that study to have been effectively "abolished" by the Iowa rules was electronic media advertising. *See* ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 106 (1995). Iowa's rule governing electronic media advertising is not at issue here.

requirements before placing an advertisement that is misleading or potentially misleading to the public.

Contrary to Petitioner's assertion, nothing in the record supports his claims that the Iowa rule injures "[m]illions of citizens" and "tramples the rights of small businessmen and women." (Pet. 25.) The only evidence Petitioner cites for either of these assertions is two statistics: 1) over ten thousand lawyers are licensed to practice in Iowa and 2) less than ten percent have qualified and registered to advertise areas of practice. Petitioner overlooks other evidence, however, which belies the inferences he draws.

First, he fails to mention that only about half of those ten thousand lawyers are engaged in any private practice (either full or part time) within the state of Iowa. (App. below 70-71.) Lawyers not in private practice would have no reason to advertise. Second, the number of lawyers who are willing and able to qualify to advertise areas of practice has been increasing annually (from 96 in 1986 to 527 in 1996). (App. below 207.)

Especially significant in this regard is an American Bar Association report (which Petitioner himself offered in evidence below) showing that a substantial number of lawyers in Iowa simply do not want to advertise. ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 59 (1995) (App. below 213). The ABA report in turn cited a study and survey, Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179, 248 (1991), which found that a majority of Iowa lawyers would not advertise even if convinced that

advertising would increase the volume of their legal business. The same law review study showed that only about twenty-five percent of lawyers surveyed in Iowa thought that lawyer advertising was in the best interests of the public and less than twenty percent believed it was in the best interests of the legal profession. *Id.* at 247-48. These attitudes, rather than "burdensome" ethical restrictions, explain why a majority of Iowa lawyers limit their advertising.

There is no reason to believe that lawyers who *want* to qualify to advertise areas of practice are unable to do so. Petitioner has not identified a single Iowa lawyer, other than himself, who supposedly desires to advertise areas of practice but is unable legitimately to do so because of a difficulty in complying with DR 2-105(A)(4).

Moreover, Petitioner overlooks that he himself has met the practice and educational criteria for advertising "bankruptcy" since at least 1994, but has chosen not to file the necessary report with the continuing legal education commission. Petitioner conceded at the hearing below that the filing of such a report would not be unduly burdensome. (App. below 111.)

The Iowa Supreme Court found that Petitioner's advertisements were actually misleading. (Opinion, Pet. A-9.) Petitioner inaccurately claims this finding is contrary to the Board's position below. The Board's position both below and here is that Petitioner's ads were not *false*; the Board consistently has argued that the ads are at least potentially *misleading*.

Further corrections and additions to Petitioner's statement of facts are set forth as necessary in the following statement of reasons for denying the writ.

REASONS FOR DENYING THE WRIT

I. THE LIMITED RESTRICTION ON LAWYER ADVERTISING IMPOSED BY THE IOWA RULE IS PERMISSIBLE UNDER THE FIRST AMENDMENT AND THIS COURT'S DECISIONS IN LIGHT OF THE RECORD ACTUALLY MADE BELOW.

The Iowa court's decision rests not on disregard of prior holdings of this Court but on the record made below, significant portions of which Petitioner omits to mention. There is no compelling reason for this Court to review the Iowa court's decision.

1. Petitioner claims "[t]his Court should decide whether truthful and readily verifiable statements about the most basic element of attorney advertising – fields of practice – can be severely and unreasonably restricted, or whether such restrictions violate the first amendment." (Pet. 16.) This statement of the issue presents no "issue" at all. It is well settled that an unreasonable restriction on commercial speech is unconstitutional. The record here, however, shows that the restriction at issue is a reasonable fit with the articulated interest of protecting the public interest in informed – as opposed to misinformed – selection of legal representation. (Opinion, Pet. A- 6-8.)

2. Petitioner inaccurately claims the Board offered no evidence to support the substantial interest identified in the Iowa court's decision. (Pet. 7-8, 20.) To the contrary,

the Board presented evidence that advertisements listing practice in areas of the law are misleading or at least potentially misleading, thereby warranting regulation. In 1988 the Iowa Supreme Court reviewed and amended its lawyer advertising rules. As part of that review a special master heard evidence and made findings which the Board offered at Petitioner's hearing below. The special master found that consumers, in relying on an attorney's listing of fields of practice, assume the attorney has additional education and expertise in the advertised fields. (App. below 165-66) (Opinion, Pet.A- 8-9). Consequently, "the type of information the public finds most useful in the choice of a lawyer could, in fact, lead them astray in certain instances." (App. below 166-67.) Petitioner presented no evidence to rebut these findings.

The danger that the public will be misled by advertisements listing fields of practice is not merely hypothetical. It is shown by *Committee on Professional Ethics & Conduct v. Morris*, 490 N.W.2d 806 (Iowa 1992). *Morris* involved a lawyer who specified "immigration law" in his yellow-page advertisement. A Canadian citizen relied on this listing of practice to select Morris to represent her in obtaining lawful employment in the United States. Morris, however, had little experience in immigration law, had not met the eligibility requirements of DR 2-105(A)(4), and failed to take the necessary steps to protect her interests. As a result, she was arrested while on the job by immigration authorities and forced to "voluntarily" leave the country in lieu of deportation. *Id.* at 807.

3. The Iowa rule directly and materially advances the interest it seeks to protect. Compliance with the rule

ensures that a lawyer who advertises practice in a particular area has actual experience and current training in that area.

It is unnecessary for the Board to prove that the relevant state interest is directly advanced *as applied to Petitioner.* The question is whether the rule serves the general governmental interest sought to be advanced. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427-29, 113 S.Ct. 2696, 2704, 125 L.Ed.2d 345, 355-56 (1993). Here, however, Petitioner had little experience and continuing education in most of the areas he advertised. As the Iowa court found, his advertisements therefore were misleading. (Opinion, Pet. A-9.)

4. Petitioner fails to show why this Court should review the Iowa court's determination that DR 2-105(A)(4) is reasonably and narrowly drawn. He begins by making a facile comparison between the thirty-day waiting period upheld in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), and the two-year waiting period of DR 2-105(A)(4). He argues the Iowa rule is not narrowly drawn because it requires a waiting period that "is twenty-four times the length of the ban in [*Florida Bar*]." (Pet. 22).

This argument overlooks the obvious differences in purpose between DR 2-105(A)(4) and the rule upheld in *Florida Bar*, which banned targeted direct mail solicitation of accident victims and their relatives for thirty days. *Id.* at 620-21, 115 S.Ct. at 2374, 132 L.Ed.2d at 547. The Iowa court concluded, and reasonably so, that lawyers do not acquire special expertise overnight in a particular area of the law. Common sense alone dictates that the experience

and expertise of one who recently graduated from law school is unlikely to exceed that of the average lawyer.

Petitioner further contends DR 2-105(A)(4) is not reasonably drawn because the state has less restrictive alternatives available. A restriction on commercial speech, however, need not be a perfect fit, the best disposition, or the least restrictive means of protecting a governmental interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388, 403-04 (1989).

Some of the alternatives Petitioner suggests (for example, passing a competency test in an area of the law) may well be more onerous than the requirements of DR 2-105(A)(4). Another option – use of disclaimers – is more reasonably viewed as a complement than as an alternative. Though disclaimers are helpful, they are not a cure-all. Evidence offered below from the review of Iowa's advertising rules conducted in 1988 shows that while most consumers find disclaimers understandable, many consumers do not bother to read them. (App. below 107). Disclaimers alone cannot be said to eliminate the potential for misinformation in the selection of counsel.

5. Petitioner contends the decision below is contrary to *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). The Iowa court correctly concluded that Petitioner's reliance on *R.M.J.* is misplaced because the rule in that case precluded advertising fields of practice in any language other than specified by the rule, while the Iowa rule imposes no such absolute ban: "Iowa lawyers, after meeting the eligibility requirements, are free to advertise

within reasonable limits." (Opinion, Pet. A-10) (citation omitted).

6. Petitioner claims the Iowa court misread this Court's decision in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 133 L.Ed.2d 541 (1995), apparently on the ground that the Iowa court and other state courts "may see *Went For It* as a complete reversal of the attorney advertising cases that began with *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)." (Pet. 10.) No person or court, to the Board's knowledge, has interpreted *Florida Bar* as a "complete reversal" of this Court's lawyer advertising jurisprudence. Certainly nothing in the opinion and judgment below suggests that the Iowa Supreme Court so interpreted *Florida Bar*. Rather, the Iowa court began its opinion by expressing deference to *Bates*. (Pet. A-2.)

7. Petitioner notes a "concern" over a "disjuncture between regular commercial free speech cases and the attorney advertising cases." (Pet. 10-11.) Such a "disjuncture" raises no important question that demands resolution. This Court consistently has recognized that advertising by the learned professions and particularly by the legal profession raises concerns not present in other commercial speech cases. *E.g., Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (distinguishing CPAs from lawyers); *In re R.M.J.*, 455 U.S. 191, 202, 102 S.Ct. 929, 937, 71 L.Ed.2d 64, 73 (1982) (public's comparative lack of knowledge, limited ability of professions to police themselves, and absence of "product" standardization make advertising for professional services especially susceptible to abuses that states have legitimate interest in controlling). Petitioner fails to

explain why this well-recognized distinction is troubling or merits the Court's review at this time.

In sum, Petitioner's First Amendment analysis rests largely on a disregard of the record in support of the Iowa rule and presents no reason for this Court to review the opinion and judgment below.

II. THE DISCIPLINARY RULE APPLIES TO ALL LAWYERS IN IOWA AND PRESENTS NO ISSUE OF EQUAL PROTECTION.

Petitioner has raised two equal protection challenges to the Iowa rule governing advertisement of areas of practice. (Pet. 11-16, 26-28). Both challenges stand and fall on the misconception that the Iowa rule fails to treat similarly situated persons alike.

1. This case presents no issue of equal protection. The Iowa rule applies to all lawyers and does not discriminate among those similarly situated. Any lawyer may advertise practice in various areas, after meeting the same eligibility requirements that apply to all other lawyers in the state.

Petitioner's contention appears to be that DR 2-105(A)(4) creates two classes of lawyers: those who meet the eligibility requirements ("[s]easoned attorneys with years of experience in a particular field of law") (Pet. 27) and those (especially recent law school graduates) who do not. *All* lawyers, however, are recent law school graduates at the outset of their careers. *All* (including all recent graduates) are subject to the eligibility requirements before advertising areas of practice.

2. In claiming that this case implicates equal protection concerns, Petitioner relies on *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (striking down as a denial of equal protection a state constitutional amendment banning ordinances protecting homosexuals). (Pet. 10, 15-16.) Petitioner baldly asserts that "[t]he Iowa State Supreme Court's decision in the present case is contrary to the careful reasoning in *Romer*." (Pet. 16.) The offending provision in *Romer* – unlike the advertising rule here – raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at ___, 116 S.Ct. at 1628, 134 L.Ed.2d at 867. No one can reasonably claim that DR 2-105(A)(4) is the result of animosity toward lawyers on the part of the Iowa Supreme Court. *Romer* offers no reason for extending rational basis or strict scrutiny analysis to the limited regulation of commercial speech involved here.

3. Even if the Iowa rule distinguishes between those similarly situated, Petitioner has failed to show that the rule is irrational. His argument boils down to the claim that it contains loopholes. While the rule may not wholly solve the problem it was designed to address, this does not make the rule invalid. *See United States v. Edge Broadcasting Co.* 509 U.S. 418, 434, 113 S.Ct. 2696, 2707, 125 L.Ed.2d 345, 360 (1993) (noting that ban on broadcast advertising of cigarettes is constitutional, even though such ban does not work to "keep the public wholly ignorant of the availability of cigarettes").

Moreover, the Iowa rules do not contain all the loopholes Petitioner asserts. He claims that the rules contain "inconsistencies" because, though he cannot directly say

he practices in bankruptcy or other areas, he can advertise his fees for those areas. (Pet. 12-13.) This claim is misleading. The fees which may be advertised under the Iowa rules come from a list of relatively simple, standardized services, including *uncontested* dissolutions of marriage, *simple* residential deeds, and *uncontested* personal bankruptcies. Iowa Code of Professional Responsibility for Lawyers DR 2-101(E) (Pet. D- 41-42). Because the terminology itself suggests the uncomplicated nature of the services, a consumer would be unlikely to conclude that the advertising lawyer has special expertise beyond that of other lawyers.

Though Petitioner is correct that the Iowa rules allow advertisements to mention membership in professional organizations which may suggest particular areas of the law (Pet. 12), the attorney who so advertises must include within the advertisement itself a separate disclaimer in addition to the one required by DR 2-105(A)(4). *See* Iowa Code of Professional Responsibility for Lawyers DR 2-101(C) (requiring disclaimer: "Membership and offices in legal fraternities and legal societies . . . and societies of law or field of practice does not mean that a lawyer is a specialist or expert in a field of law, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.") (Pet. D- 39-40).

As for another alleged inconsistency, Petitioner is incorrect in claiming he can circumvent DR 2-105(A)(4) by advertising "he is admitted to practice in certain specialized courts such as the bankruptcy court." (Pet. 13.) There is no admission to bankruptcy court as such. Any attorney licensed in federal district court is eligible to practice in the field of bankruptcy. (App. below 85.) It

would be at least potentially misleading for an advertisement to imply that an attorney has met some further qualification for practice in bankruptcy court.

In short, the Iowa rule presents no issue of equal protection for the Court to review and, while not perfect, is not "replete" with inconsistencies as Petitioner claims.

III. PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO PRESENT HIS FEDERAL CONSTITUTIONAL CHALLENGES FOR RESOLUTION BY THE IOWA SUPREME COURT AND THEREFORE WAS NOT DENIED DUE PROCESS.

This issue does not merit review, as it results from Petitioner's misperception of the facts and the grievance procedure in Iowa. Petitioner's claim is that he was denied a full and fair opportunity to present his constitutional arguments below because, he says, the Board "never did consider [his] constitutional challenges" and because the hearing panel (the grievance commission) believed it was not authorized to determine the constitutionality of DR 2-105(A)(4). (Pet. 28-29.) Petitioner does not deny that the Iowa Supreme Court itself considered and resolved his constitutional challenges to the advertising restriction.

1. Petitioner is only partly correct in asserting that "[t]he Board never did consider the Petitioner's constitutional challenges" and "never conducted a hearing on these challenges prior to filing its complaint before the Grievance Commission." (Pet. 29.) It is true that the Board (which did consider and reject the constitutional

claims) determined to file formal charges against Petitioner without first affording him the opportunity to appear at a hearing. Such a hearing, however, is not required by due process. The Board's role in these proceedings is that of prosecutor. *See* Iowa Supreme Court Rule 118.2. and 118.5. (Resp. A- 7.) The Board is unaware of any authority – and Petitioner does not cite any – requiring a prosecutorial entity to conduct a hearing before presenting charges.

2. Petitioner is correct that the hearing panel (grievance commission) failed to address the merits of the constitutional challenges. This failure, however, in no way presents a due process issue. Under Iowa procedure, the grievance commission would not have resolved the constitutional issues in any event. *See Committee on Professional Ethics & Conduct v. Kaufman*, 515 N.W.2d 28, 30 (Iowa 1994) (in its de novo review, state supreme court independently determines matter and is not bound by commission's findings). *See* Iowa Sup.Ct.R. 118.10 and 118.11. (Resp. A- 8-9.)

3. Petitioner does not deny he had a full opportunity to make a *record* before the commission regarding the constitutional issues, and that record was available to the Iowa Supreme Court. *See* Iowa Supreme Court Rule 118.10 (entire record before commission is transmitted to court for de novo review). (Resp. A- 8.) Petitioner was able to brief and argue his constitutional challenges to the Iowa court and the court in fact considered (and rejected) them.

Petitioner's first due process argument is frivolous.

IV. PETITIONER'S DUE PROCESS CHALLENGE TO THE IOWA COURT'S CONSIDERATION OF A PRIOR ADMONITION HE RECEIVED FOR SIMILAR MISCONDUCT (WHICH HE ADMITS COMMITTING) HAS BEEN WAIVED AND IS WITHOUT MERIT.

Petitioner contends his right of due process has been violated by the Iowa court's consideration, in imposing a sanction in this proceeding, of an admonition he received for a previous violation of DR 2-105(A)(4). This issue does not warrant review because it was waived below by Petitioner and in any event has no merit.

1. Petitioner claimed in his appellate brief to the Iowa Supreme Court that consideration of the prior admonition would violate due process under the Fifth Amendment, but cited no authority in his brief for that claim. Under Iowa appellate procedure the issue therefore may be considered waived. Iowa R.App.P. 14(a)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.") (Resp. A- 10). It appears this is how the Iowa court treated the issue, as its opinion contains no mention of it. The Board respectfully submits that this Court should not be a court of first hearing for an issue Petitioner failed to properly present below.

2. Even if Petitioner's claim is not waived, it would not merit review. The admonition imposed in 1992 was for the same kind of advertising violations implicated here. Petitioner does not deny the conduct on which the admonition was based. He in fact admits that he listed "bankruptcy" in an advertisement in 1992 and that he has never filed an eligibility report with the Iowa continuing

legal education commission.[2] (App. below 86, 113-14, 132-33.)

The situation here is similar to a sentencing court's consideration of a criminal defendant's commission of other, related conduct of which he or she has not been convicted. Such other conduct may properly be considered if the facts before the court show the defendant committed it. *See United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 638, 136 L.Ed.2d 554, 565 (1997) (court may consider conduct of which defendants had been acquitted where evidence showed defendants in fact had committed such crimes). Here, any doubts about the propriety of the Iowa court's consideration of the prior admonition are resolved by Petitioner's admission of the conduct on which the admonition was based.

Petitioner has failed to present an arguable claim of denial of due process for this Court's review.

---

[2] When the admonition was issued, Respondent took exception thereto not because he was denying the facts but because he challenged the constitutionality of DR 2-105(A)(4). (App. below 105).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES L. HARRINGTON
521 East Locust St., Fl. 3d
Des Moines, Iowa 50309-1939
(515) 243-0027
Counsel for Respondent

[Iowa Code of Professional Responsibility
for Lawyers DR 2-105]

DR 2-105 Description and Limitation of Practice.

(A) A lawyer may be identified as practicing in or limiting practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card, letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents", "Trademarks", or "Copyright Law" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice

primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Law
Admiralty Law
Adoption Law
Alternate Dispute Resolution
Antitrust and Trade Regulation
Appeals
Banking
Commercial and Retail Collections
Constitutional Law
Construction Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Law
Discrimination and Civil Rights Law
Domestic Relations and Family Law
Employment Law
Environmental Law
Health Law
Immigration Law
Insurance Law
International and Foreign Law
International Trade and Investment
Labor Law
Malpractice or Professional Negligence
Military Law
Municipal Law
Pension and Profit Sharing Law
Personal Injury Law
Product Liability Law
Public Utility Law

Real Estate Law
Securities Law
Social Security Disability
Taxation Law
Trademarks and Copyright Law
Trial Law
Wills, Estate, and Probate Law
Workers' Compensation Law.

The Iowa Supreme Court Board of Professional Ethics and Conduct, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2-105(A)(2) shall be only in the following manner.

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "practice limited to. . . . "

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "practicing primarily in. . . . "

(c) In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories, there shall be contained within such

communication, or prominently displayed on the same page of such communication, and contained in any electronic media communication the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

"A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.

All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers," except as provided in DR 2-101(B)(2)(b).

(4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or 20 percent of the lawyer's time spent in actual law practice to each

separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) If advertising uses the term general practice, the lawyer may not list areas of practice under DR 2-105 preceded by the words "practice limited to. . . . " The term general practice may be used if the listing of areas of practice is preceded by the words "practicing primarily in. . . . "

(C) The nature of one's professional practice, or the types of cases or matters handled, may not be described other than as permitted by DR 2-105 and DR 2-101(E).

(D) If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the commission on continuing legal education for an extension of time in which to complete the hours. No extension of time shall be granted unless

written application therefor shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

[Portions of Iowa Supreme Court Rule 118]

Court Rule 118.2. Processing of complaints. There is hereby created the Iowa Supreme Court Board of Professional Ethics and Conduct. The board shall consist of seven lawyers and two laypersons appointed by the supreme court. * * * The board members are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa. Upon completion of any such investigation the Board of Professional Ethics and Conduct shall either dismiss the complaint made, or admonish or reprimand the attorney, or file and prosecute the complaint before the grievance commission or any division thereof. * * *

* * *

Court Rule 118.5. Complaints. Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chair of the Board of Professional Ethics and Conduct and served upon the attorney concerned as provided by the rules of the grievance commission. Such complaints shall be sufficiently clear and specific in their charges to reasonably inform the attorney against whom the complaint is made of the misconduct alleged to have been committed. All complaints, motions, pleadings, records, reports, exhibits, evidence and all other documents or things filed under this rule or received in evidence in a hearing before the grievance commission shall be filed with and preserved by the clerk of the grievance commission in Des Moines, Iowa,

all of which shall at all times be available to this court or anyone designated by this court.

* * *

Court Rule 118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the clerk of the grievance commission shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule 118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties. Upon such review de novo the court may impose a lesser or greater sanction than the discipline recommended by the grievance commission.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

Court Rule 118.11. Appeal. The respondent may appeal from the report filed by the grievance commission pursuant to rule 118.9 to this court. . . .

* * *

After the filing of a notice of appeal or the granting of permission to appeal, the appeal shall proceed pursuant to the Iowa Rules of Appellate Procedure to the full extent those rules are not inconsistent with this rule. * * * Review shall be de novo. If a respondent's appeal is dismissed for lack of prosecution pursuant to Iowa Rule of Appellate Procedure 19 or for any other reason, this court shall proceed to review and decide the matter pursuant to court rule 118.10 as if no appeal had been taken.

[Iowa Rule of Appellate Procedure 14(a)(3)]

Rule 14. Briefs.

a. *Appellant's brief.* The brief of appellant shall contain under appropriate headings and in the following order:

* * *

(3) A statement of the issues presented for review. Under each issue separately stated shall be a list of all cases, statutes and other authorities referred to in the argument covering that issue. The authorities which are considered to be the most pertinent and convincing shall be indicated by underlining. Not less than one nor more than four authorities under each separately stated issue shall be so indicated. Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.